

MEETING
STATE OF CALIFORNIA
THE RESOURCES AGENCY
CENTRAL VALLEY FLOOD PROTECTION BOARD
JOINT POWERS AGENCY SUBCOMMITTEE

JOINT OPERATIONS CENTER
3310 EL CAMINO AVENUE
CONFERENCE ROOM LL20
SACRAMENTO, CALIFORNIA

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APPEARANCES

SUBCOMMITTEE MEMBERS

Mr. Butch Hodgkins

Ms. Lady Bug Doherty

Ms. Teri Rie

STAFF

Mr. Jay Punia, Executive Officer

Ms. Virginia Cahill, Legal Counsel

Mr. Dan Fua, Supervising Engineer

Ms. Lorraine Pendlebury, Staff Analyst

DEPARTMENT OF WATER RESOURCES

Mr. Ward Tabor, Assistant Chief Counsel

ALSO PRESENT

Mr. Michael Bessette, City of West Sacramento

Mr. Paul Devereux, Reclamation District 1000

Mr. Ron Erickson, Sutter County

Mr. Steve Fordice, Reclamation District 784

Mr. Jim Giottonini, San Joaquin Area Flood Control
District

Mr. Paul Hight, County of Sacramento

Mr. Tim Kerr, American River Flood Control District

Mr. Scott Shapiro

Mr. Steven Winkler, San Joaquin County

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1 PROCEEDINGS

2 EXECUTIVE OFFICER PUNIA: Welcome, everybody.

3 I'm Jay Punia, Executive Officer for the Central Valley
4 Flood Protection Board. Welcome to the Joint Power
5 Subcommittee meeting.

6 I want to make sure everybody has a copy of the
7 agenda. If not, we have copies here, and we can bring it
8 to you.

9 As some of you may remember, at the last Board
10 meeting, that the Board established the Subcommittee and
11 the Board nominated Board Member Butch Hodgkins, Board
12 Member Lady Bug and Teri Rie and Emma Suarez to be the
13 members of this Subcommittee.

14 And the first order of business is to select a
15 Chairperson for this Subcommittee.

16 Emma Suarez is sick and won't be here. But the
17 rest of the Board members are here. So I think the
18 Board -- among yourselves, you have to select a
19 Chairperson for this meeting.

20 SUBCOMMITTEE MEMBER HODGKINS: Why don't we do
21 that. And then we can go back and do introductions. And
22 maybe we can do this by acclamation. I would like to
23 nominate Emma as the Chairperson.

24 SUBCOMMITTEE MEMBER DOHERTY: Well, I would like
25 to second that.

1 SUBCOMMITTEE MEMBER HODGKINS: Teri?

2 SUBCOMMITTEE MEMBER RIE. It's fine with me.

3 MR. SHAPIRO: Well, call her and see if she
4 objects.

5 (Laughter.)

6 SUBCOMMITTEE MEMBER HODGKINS: You don't show up,
7 that's what happens. No.

8 I'm going to assume she will accept that. And I
9 think she'll serve us well.

10 And so in her absence, would one of you like to
11 run the meeting?

12 SUBCOMMITTEE MEMBER DOHERTY: I think Teri would
13 like to run the meeting.

14 SUBCOMMITTEE MEMBER RIE: Okay. Sure.

15 SUBCOMMITTEE MEMBER DOHERTY: So now do we have
16 to vote, or is this by acclamation?

17 SUBCOMMITTEE MEMBER HODGKINS: Well, in terms
18 of -- it's not a hearing. It's a workshop more than
19 anything else. And I think we can just let Teri do it.

20 SUBCOMMITTEE MEMBER RIE: First item is
21 introductions. Why don't we start with Jay Punia.

22 EXECUTIVE OFFICER PUNIA: Jay Punia, Executive
23 Officer, Central Valley Flood Protection Board.

24 LEGAL COUNSEL CAHILL: Ginny Cahill, counsel to
25 the Board.

1 SUPERVISING ENGINEER FUA: Dan Fua, staff
2 engineer for the Board.

3 MR. SHAPIRO: Scott Shapiro representing a number
4 of local agencies.

5 MR. HIGHT: Paul Hight, Sacramento County.

6 MR. DEVEREUX: Paul Devereux, General Manager,
7 Reclamation District 1000.

8 MR. KERR: Tim Kerr, General Manager, American
9 River Flood Control District.

10 MR. BESSETTE: Mike Bessette, Flood Protection
11 Manager, City of West Sacramento.

12 STAFF ANALYST PENDLEBURY: Lorraine Pendlebury,
13 Staff Analyst for the Board.

14 MR. ERICKSON: Ron Erickson, Sutter County
15 Counsel.

16 MR. WINKLER: Steve Winkler, San Joaquin County.

17 MR. GIOTTONINI: Jim Giottonini, SJAFCA.

18 SUBCOMMITTEE MEMBER RIE: Teri Rie, Central
19 Valley Flood Board.

20 SUBCOMMITTEE MEMBER DOHERTY: Lady Bug, same
21 thing.

22 SUBCOMMITTEE MEMBER HODGKINS: Butch Hodgkins,
23 same thing.

24 DWR ASSISTANT CHIEF COUNSEL TABOR: Ward Tabor,
25 Department of Water Resources.

1 SUBCOMMITTEE MEMBER RIE: Well, thank you very
2 much.

3 The next item on the agenda is a presentation on
4 when and for what JPA member agencies are liable for the
5 debts and liabilities of the JPA related to the six
6 specific situations.

7 Now, I'm not sure if we have someone who wanted
8 to present. And I don't know if Ms. Cahill or Mr. Tabor
9 wanted to start off, or Mr. Shapiro.

10 LEGAL COUNSEL CAHILL: Yeah, I think Mr. Shapiro
11 has a PowerPoint addressing that. And I reviewed the
12 accompanying memo. And with regard to these points, I
13 think we're pretty much in agreement. So if he could go
14 ahead and do that, you know, if, at some point, we aren't
15 in agreement, I'll speak up.

16 SUBCOMMITTEE MEMBER HODGKINS: Are we going to do
17 a history of this?

18 SUBCOMMITTEE MEMBER RIE: Would someone like to
19 give a brief history of why we're having the Subcommittee
20 meeting today?

21 LEGAL COUNSEL CAHILL: Well, I think the point is
22 that traditionally the Corps of Engineers built projects
23 and turned them over to the State, which turned them over
24 to the locals. And in recent years we've had these EIP
25 projects, where the locals are actually taking the lead in

1 design and construction, being responsible for getting the
2 projects done.

3 And in the past, most of the time the Board
4 entered into indemnity agreements with the joint powers
5 authority. Then a couple of years ago when Three Rivers
6 came along, there was some concern that Three Rivers
7 didn't have the resources to really stand behind the
8 agreement. And to be honest, at the time, the Board
9 members had some concerns with land use in that area. And
10 so they required the individual members of the JPA to also
11 sign the indemnity and O&M agreements.

12 And since then, the Board's application may not
13 have been consistent. And so it was decided to have this
14 Subcommittee and have the Board look at whether they
15 wanted to come up with an actual policy for how they were
16 going to handle this type of agreement when the applicant
17 for a permit was a joint powers agency.

18 SUBCOMMITTEE MEMBER HODGKINS: Thanks.

19 SUBCOMMITTEE MEMBER RIE: Thank you very much.

20 I believe Mr. Shapiro has some handouts that
21 perhaps you'd like to have us pass around --

22 MR. SHAPIRO: Sure.

23 SUBCOMMITTEE MEMBER RIE: -- before you get
24 started.

25 MR. SHAPIRO: Thank you.

1 So this is a printout of the PowerPoint, so that
2 everyone can have a copy. And also the PowerPoint is now
3 on the Board's laptop. So to the extent the Board wants to
4 post it on the web, that's fine.

5 I didn't finish this until after 11 last night.
6 And subsequent to that, I've had two folks identify two
7 errors. So when we get to those pages, we'll point them
8 out. I didn't have time this morning to make changes and
9 reprint it out in light of my schedule.

10 (Thereupon an overhead presentation was
11 Presented as follows.)

12 MR. SHAPIRO: But what I did was to try to put
13 together a PowerPoint presentation that covered Agenda
14 Items No. 4, No. 5, No. 6, and No. 8.

15 And, Teri, I'll just look to you as I go through
16 this to pause me when you want -- you know, my hope was
17 all along when you requested this, that this would be a
18 workshop and with us to be interactive. I don't want to
19 just sit here and talk. But I thought the PowerPoint
20 would be a good way of focusing our attention on things.
21 So if I get too much, let me know.

22 SUBCOMMITTEE MEMBER RIE: Are you okay to accept
23 questions or comments?

24 MR. SHAPIRO: Absolutely. And I should say that
25 Paul Hight, who's next to me, is -- are you the risk

1 manager for the County of Sacramento?

2 MR. HIGHT: Supervisor of Liability.

3 MR. SHAPIRO: Supervisor of Liability?

4 He supervises all liability for the County of
5 Sacramento. He also functions in that capacity for SAFCA
6 in contractual arrangements and has a lot of expertise in
7 insurance and indemnities and issues like that. So I'm
8 going to rely heavily on him.

9 And then we've got a smattering of local agencies
10 that cannot only show perspectives, but can provide
11 information if you'd like.

12 SUBCOMMITTEE MEMBER RIE: One second.

13 If anybody would like to ask questions or
14 comment, please raise your hand. And if you want to state
15 your name, that's completely optional. You don't have to.
16 And I'll call on you.

17 MR. SHAPIRO: Well, thank you again for the
18 chance to speak with you about this topic. What I've
19 really tried to do on every item, except No. 8, was to try
20 to present an unbiased review of this issue. My hope all
21 along has been that today's meeting will be educational;
22 it will not resolve the issue. I think we all need some
23 time to see if we agree on the background and the legal
24 constraints. And then hopefully we can put together a
25 good policy that the Board can support and the local

1 agencies can live with.

2 So, Ginny, you'll correct, as I go, if you
3 disagree with anything.

4 LEGAL COUNSEL CAHILL: Right.

5 --oOo--

6 MR. SHAPIRO: So apropos of what we just said,
7 the top bullet on this slide, the issue, was the issue
8 that I presented to the Board three months ago when I made
9 my presentation.

10 SUBCOMMITTEE MEMBER RIE: Mr. Hodgkins.

11 SUBCOMMITTEE MEMBER HODGKINS: Not a question.

12 But, Scott, I think it's important -- I think
13 everybody knows that you're not working for the Board in
14 putting this together. Would you kind of make clear, so
15 everybody understands and it is on the record, what your
16 relationship is here.

17 MR. SHAPIRO: Yeah, I'm not working for the
18 Board. And I'm special counsel for SAFCA and the San
19 Joaquin Area Flood Control Agency. I'm general counsel
20 for Three Rivers and the Sutter Butte Flood Control
21 Agency. And I'm co-program manager for the West
22 Sacramento Area Flood Control Agency. And then special or
23 general counsel for about 20 reclamation districts and
24 levee districts and those kinds of entities.

25 And so, in some sense, this issue that's before

1 us today is more an issue of member agencies of JPAs. But
2 I think the JPAs, all five of them, have seen a value in a
3 single person coordinating this. And so I've taken on
4 that role. But everything I'm doing is being fed back to
5 the local agencies. We had -- we've actually had two
6 meetings, I guess. I think there's the one we had at
7 SAFCA and one at my office. And I have a group of experts
8 that advise on things.

9 So this is definitely the view of the local
10 agencies. It's my hope that, except for No. 8, it's all
11 factually and legally correct and noncontroversial.

12 SUBCOMMITTEE MEMBER HODGKINS: Thank you.

13 MR. SHAPIRO: So returning to slide 2, the issue
14 is the issue that's been presented before, which is
15 whether the Board should make a condition of permits to
16 JPAs that JPA member agencies must indemnify for a
17 liability arising out of that permit.

18 But today is really the second bullet, which is,
19 before deciding on a policy, let's understand the legal
20 concepts that control the liability of JPA member
21 agencies. This is, I think, valuable not only as an
22 education for the Board members, but for the local agency.
23 Because what's the use of a local agency arguing against
24 potential liability if, through another legal route, it
25 has liability anyway.

1 And for the Board, it's also valuable to
2 understand exactly what the liabilities are and the
3 consequences of adding potentially additional liabilities.
4 So I do think of this as two-sided education.

5 --o0o--

6 MR. SHAPIRO: Now slide 3 is just the recitation
7 of what's described on the Agenda Item 4.

8 Now, what you'll see is, is that since
9 development of the agenda - and I helped develop the
10 agenda - I realized that the six subcategories under No.
11 4, the six circumstances, are interesting, but they're not
12 really the issue, because the six are when a member agency
13 of a JPA is liable for the actions of the JPA. But what
14 we're talking about sometimes is, is the JPA itself liable
15 to the Board? And you need to know that in order then to
16 feed it through. So you'll see that I talked about the
17 six points, but then I get into what I think is the meat
18 of the matter.

19 --o0o--

20 MR. SHAPIRO: So first we start with torts. And
21 a tort is a breach of a legal duty imposed other than by
22 contract, concepts of negligence and nuisance. It's
23 anytime you would sue another party for doing a wrong to
24 you that was based on something other than a contract.

25 And Government Code Section 895.2 -- and I want

1 to try to avoid just reading you the slide. But basically
2 what it says is, is where you have a JPA agreement, then
3 where the JPA is liable for a tort, the members of the JPA
4 are also liable for the tort. So I want to try to use
5 examples as we go through this.

6 If SAFCA is negligently liable to someone for
7 something, and it doesn't pay up, then the person to whom
8 that -- the person to whom that liability is owed could go
9 to the member agencies of SAFCA.

10 And the final bullet point says this applies
11 whether the JPA is still in existence or not, because
12 liability arises as of the time of the tort. And so,
13 again, we're only talking about the torts of the JPA. If
14 SAFCA creates liability and then goes out of business, the
15 liability still existed as of the date that SAFCA was
16 there, and therefore the member agencies would be liable
17 as well. So torts are relatively simple.

18 Ginny, are you in agreement thus far with what I
19 presented?

20 LEGAL COUNSEL CAHILL: I think so. I hadn't
21 specifically looked about what happened when -- after the
22 JPA was out of existence, but certainly it's true as long
23 as it is. And I think it's likely true after it's gone as
24 well.

25 SUBCOMMITTEE MEMBER DOHERTY: But how can that be

1 if -- upon dissolution of the JPA and assets are disposed
2 of? So then how can somebody be liable when you have no
3 assets?

4 MR. SHAPIRO: Well, the JPA would be liable but
5 wouldn't have assets. But the law says that when a JPA is
6 liable, its member agencies are liable too. And so then
7 the wronged -- the person who had been wronged would go
8 after the members.

9 So two concrete examples:

10 If SAFCA -- and I'm just going to pick on SAFCA
11 because it's the one we all know the most. If a SAFCA
12 employee trespasses on someone's property and causes
13 damage to that property and SAFCA is sued, then SAFCA is
14 liable. And under this law, the member agencies are also
15 liable for what SAFCA is liable for. So if SAFCA doesn't
16 make good on the liability, then the member agencies
17 would.

18 Second example. Employee of SAFCA trespasses.
19 SAFCA goes out of business the next day. The person who
20 was trespassed against would now say, "Well, as of the
21 moment of the trespass, SAFCA was liable. They're not
22 liable only when I sue them. They are liable for the
23 trespass. SAFCA is not there anymore, but its member
24 agencies were liable as of the moment of the trespass too.
25 Therefore, I can now just sue the member agencies."

1 SUBCOMMITTEE MEMBER DOHERTY: Okay. I was just
2 thinking of some of the examples you had given in the
3 information you sent to us.

4 SUBCOMMITTEE MEMBER HODGKINS: Can I pose a
5 little different example. And if you're coming to it, let
6 me know.

7 SAFCA is out of existence. Somebody walking
8 along the levee trips and falls and alleges that the
9 reason they tripped and fell and were injured was because
10 the levee wasn't properly restored -- well, wait a minute.

11 I guess I answered my own question. It's still
12 SAFCA's fault.

13 MR. SHAPIRO: Yeah. Well, let's play with your
14 example a second, if we can.

15 They trip --

16 LEGAL COUNSEL CAHILL: Say it's poorly designed.
17 "The design caused me to get injured."

18 SUBCOMMITTEE MEMBER HODGKINS: Yeah.

19 MR. SHAPIRO: And in that case, where the design
20 caused the damage, the design was done by SAFCA in its
21 existence. Therefore, it and its member agencies were
22 liable.

23 Let's say SAFCA goes out of existence and someone
24 trips and falls due to an O&M issue. Well, SAFCA is not
25 the one O&M'ing it at that point. It's whoever's O&M'ing

1 it that would be liable for the failure of O&M.

2 Now, if the failure occurred during SAFCA's
3 existence, it would be just like the design issue. It was
4 SAFCA's actual O&M that created the liability.

5 So, all we're talking about is where a JPA is
6 liable, its member agencies are also. A JPA can only be
7 liable in tort for something it does or fails to do and it
8 can only do or fail to do something during its existence.

9 SUBCOMMITTEE MEMBER HODGKINS: Okay.

10 MR. SHAPIRO: Make sense?

11 SUBCOMMITTEE MEMBER HODGKINS: I think so.

12 MR. SHAPIRO: And on all of this, you know, the
13 law, as you know, is never as clear as we'd all like it to
14 be. And if someone can come up with a good argument that
15 my arguments are wrong, I'm open to hearing them. I've
16 been struggling with this for several months, and I think
17 this is right. And, you know, Ginny will have a chance to
18 independently review it and Ward as well. And if we come
19 up with a different interpretation, I'm definitely open to
20 discuss it.

21 LEGAL COUNSEL CAHILL: Yeah, I think Butch's
22 example is the negligence did happen while SAFCA was in
23 existence, but it didn't result in injury until after
24 SAFCA was already out of existence.

25 SUBCOMMITTEE MEMBER HODGKINS: Yeah, that's kind

1 of where I was getting to. But it all gets down to,
2 maybe, who the person who was injured claims is the
3 responsible party for the cause of their injury.

4 MR. SHAPIRO: Yeah. And that's part of this
5 issue that I said the six points won't really answer all
6 the questions. You start -- it's once you have the
7 foundation of the six points that you can start applying
8 examples, like the one you're giving, and see how the
9 injured party, suing different people has different
10 results.

11 SUBCOMMITTEE MEMBER HODGKINS: Okay.

12 SUBCOMMITTEE MEMBER DOHERTY: And this may
13 bring -- it may be brought up in your display. But what
14 happens if the JPA dissolves and they turn it over to --
15 the example was given in one of our Board meetings, a 784,
16 when all they have is a lawn mower, and they don't
17 maintain things properly. So you -- the group has turned
18 it over to somebody that wasn't capable of taking proper
19 care of maintenance. So then what happens?

20 MR. SHAPIRO: Well, I think you're raising
21 several different issues there.

22 SUBCOMMITTEE MEMBER DOHERTY: So is that going to
23 be covered maybe?

24 MR. SHAPIRO: Well, maybe I can at least brief
25 you on, because I don't want to ignore your question. But

1 I think we'll start getting to some of that.

2 Your question starts to get into the issue of:

3 Well, we, the Board, are relying on someone to operate and
4 maintain it; and is the person who promised to maintain
5 it, the one who's doing so? I feel like that's a little
6 bit of where your question's going.

7 SUBCOMMITTEE MEMBER DOHERTY: Yes.

8 MR. SHAPIRO: And we're not to that point yet.

9 Because all we're talking about here is, if the JPA
10 creates liability and someone sues the JPA, are the member
11 agencies liable or not?

12 What you're getting to is now how you overlay the
13 indemnity provision over these six different rules. And
14 we will talk about that later.

15 --o0o--

16 MR. SHAPIRO: So if there's no further questions
17 for now on tort --

18 SUBCOMMITTEE MEMBER RIE: Any further questions?

19 MR. SHAPIRO: So I'll go to Slide No. 5. And
20 this is rules applicable to other liability. And the
21 reason it's set up like this is -- generally the rule is
22 the rule of Government Code Section 3508.1. Though Paul
23 tells me -- Paul tells me it's actually 6508.1, which is
24 the first typo that I didn't catch last night.

25 So for the record, I may refer to it as 3508 or

1 6508, but it's 6508.

2 The rule of Government Code Section 6508.1
3 generally says that JPAs can immunize their member
4 agencies from the liabilities of the JPA simply by saying
5 so in the JPA agreement. That's in essence what 6508.1
6 says. And as a practical matter, all five flood control
7 JPAs do just that. They seek to immunize their member
8 agencies from liability.

9 Now, when you look at the universe of types of
10 liability, they generally fall down into three categories
11 in the flood context: Contractual liabilities, tort
12 liabilities, and inverse condemnation liability.

13 We've already talked about tort. There's a
14 specific statute that says, "Where a JPA is liable in
15 tort, its member agencies are also." And that's the
16 conversation we just had about Slide No. 4. So once you
17 take that special rule out, then you say, well, what does
18 the general rule actually apply to?

19 And I think the answer is it generally applies to
20 contractual liabilities and inverse condemnation
21 liabilities. Though, as you'll see in slide 6, I think
22 there's exceptions on inverse condemnation as well.

23 So I'm going to pause on inverse condemnation for
24 a second, and I want to stick more a moment just with
25 contractual liabilities. Because my view is that's the

1 main effect of Government Code Section 6508.1, because of
2 the tort exception we already talked about.

3 Does that make sense so far?

4 So because the section says JPAs may seek to
5 immunize their member agencies by having the agreements
6 specify so, and since they all say that, as a practical
7 rule what this means is that JPA members are not liable
8 for the contractual liabilities of the JPAs.

9 Now, the great example that you might find are
10 cases out there where JPAs are committing to do things, to
11 purchasing equipment, to making payments. And then the
12 JPA doesn't live up to it, they don't have assets, to
13 perhaps go back to Lady Bug's example. Someone sues the
14 members saying, "Hey, you're the beneficiaries. Why
15 aren't you paying on this debt?" And the court says,
16 "Because the law is very clear that JPAs can immunize
17 their member agencies."

18 I think the public policy here is a buyer beware.
19 The typical person who goes to contract with a JPA, for
20 example, Kleinfelder, in contracting with a flood JPA for
21 geotechnical services, is looking and saying, "I
22 understand that to the extent that I'm going to get paid,
23 it's from the JPA." If I'm worried the JPA doesn't have
24 assets, then I'm going to ask the JPA and its member
25 agencies to sign the contract. I, the contractor, have

1 the ability to protect myself, and I choose whether to
2 protect myself.

3 So in a normal context, the rule for contractual
4 liability is the members are immunized, unless the
5 agreement says otherwise or -- it's actually phrased as a
6 negative -- that members are immunized if the agreement
7 says so and they all say so. Therefore, contractual
8 liabilities of the five JPAs do not pass through to the
9 member agencies.

10 LEGAL COUNSEL CAHILL: But there's a second part
11 to 6508.1, which says individual member agencies may agree
12 to assume any of the obligations. So while the agreements
13 say they're not for particular obligations, the member
14 agencies can. And, in fact, the reason that the Board is
15 interested in having member agencies sign on is just this,
16 if the JPA is contractually obligated to do something for
17 us and it goes out of existence - or even it doesn't go
18 out of existence, it just doesn't do it - the Board has no
19 recourse against the member agencies that haven't
20 individually agreed to live up to that contractual
21 obligation.

22 MR. SHAPIRO: And I agree with everything Ginny
23 said. And the proof of that agreement was that three,
24 four months ago when I came before the Board to propose
25 some policies for the Board to consider, one of the things

1 we proposed was that the O&M agencies, for example, from
2 American River or RD 1000, said, "We will agree to
3 separately promise to O&M the project, because we know the
4 Board wants to make sure that Three Rivers and SAFCA and
5 all the others are still there O&M'ing. And if they're
6 not there, then we want to make sure someone is." And so
7 using the provision that Ginny just said, the member
8 agencies may voluntarily elect to be bound. And the O&M
9 agencies have generally said, "Yeah, we'll sign up to O&M
10 the project, because we're going to be here even if the
11 JPA is not."

12 SUBCOMMITTEE MEMBER RIE: I have a question.

13 Okay. So if you have like a local agency like a
14 county and they sign a local cooperation agreement and the
15 JPA signs it and the reclamation district signs it and
16 they all agree to be liable for any torts of the JPA, and
17 let's say the reclamation district is negligent in their
18 O&M, will it hold up in court to also have a local agency
19 be liable for any torts?

20 MR. SHAPIRO: Run the scenario one more time, if
21 you would.

22 SUBCOMMITTEE MEMBER RIE: You have a local
23 cooperation agreement, and you have a local agency, city
24 or county, the JPA, and the reclamation district all
25 signing the local cooperation agreement. And there's a

1 tort liability and it's the reclamation district's fault.
2 By signing this agreement, is the city and the county now
3 liable for the negligence of the reclamation district?

4 MR. SHAPIRO: Well, it would depend completely
5 upon the language of the cooperation agreement. For
6 example, in the Three Rivers example, because Three Rivers
7 has had cooperation agreements just like you're
8 describing, where Three Rivers, RD 784, and Yuba County
9 have all signed the cooperation agreement, what that says
10 is that those three agencies are agreeing to indemnify the
11 State. It doesn't say they're indemnifying each other.
12 So under the language of that example, if RD 784 failed to
13 do something and was negligent and liable in tort, then
14 the cooperation agreement doesn't provide a mechanism
15 to -- for the county, for example, to seek indemnity from
16 RD 784. The indemnity flows in one direction under that
17 language.

18 SUBCOMMITTEE MEMBER RIE: So let's say the State
19 is sued because of negligence of the reclamation district.

20 MR. SHAPIRO: Okay.

21 SUBCOMMITTEE MEMBER RIE: So would the local
22 agency, who -- if their employee and their agents are not
23 bound to be liable, but because they signed an agreement,
24 are they now liable for agreeing to this contractual
25 liability?

1 MR. SHAPIRO: And the answer is a very clear
2 maybe. And the reason it's a "maybe" is because of some
3 things we're going to talk about later, which goes to
4 whether the law allows broad, open-based indemnities in
5 all circumstances or whether it would limit it in a
6 circumstance like that.

7 SUBCOMMITTEE MEMBER RIE: Okay.

8 MR. SHAPIRO: But contractually you could do it
9 and --

10 SUBCOMMITTEE MEMBER RIE: So you can agree
11 contractually to accept liability for a third party --

12 MR. SHAPIRO: You can --

13 SUBCOMMITTEE MEMBER RIE: -- even though you're
14 not negligent?

15 MR. SHAPIRO: You can certainly sign the
16 contract.

17 SUBCOMMITTEE MEMBER RIE: But would that hold up
18 in court?

19 MR. SHAPIRO: That's the question. And that's
20 what we'll talk about a little later under No. 6, what
21 indemnities are enforceable and insurable. And the
22 preview answer is there's a statute and some cases that
23 say it's against public policy for one entity to require
24 another entity to indemnify it whether or not it was at
25 fault at all. And I'll be completely --

1 SUBCOMMITTEE MEMBER RIE: We'll come back to
2 that?

3 MR. SHAPIRO: -- yeah, I'll be completely honest,
4 that there isn't great case law to apply it in this
5 circumstance. But I think the case law and statute are
6 clear enough that it raises significant concerns in our
7 minds as to whether that indemnity that you're describing
8 is enforceable.

9 SUBCOMMITTEE MEMBER RIE: Okay.

10 MR. SHAPIRO: So I don't have anything else on
11 the contractual liability, unless there are more questions
12 or comments on it.

13 --o0o--

14 MR. SHAPIRO: So the next slide is rules
15 applicable to inverse condemnation. So this is now the E
16 and F on the agenda, the fifth and sixth of the six
17 circumstances.

18 LEGAL COUNSEL CAHILL: Well, this is also one of
19 the two questions that the Board specifically asked about
20 in its November meeting.

21 MR. SHAPIRO: An inverse condemnation, if you
22 don't know, is a constitutional cause of action. The
23 constitution says the government may not take private
24 property without just compensation. And thus the courts
25 have said this means there is a cause of action that when

1 the government takes private property without just
2 compensation, an individual can sue the government under
3 the Constitution.

4 And as counterintuitive as it might seem at
5 first, a flood is considered to be taking of private
6 property, because the flood waters cover the property,
7 devalue the property, damage the property.

8 DWR ASSISTANT CHIEF COUNSEL TABOR: It may be
9 considered.

10 SUBCOMMITTEE MEMBER RIE: Mr. Tabor, do you have
11 a comment?

12 DWR ASSISTANT CHIEF COUNSEL TABOR: All floods do
13 not take property.

14 MR. SHAPIRO: You're right.

15 DWR ASSISTANT CHIEF COUNSEL TABOR: They may.

16 MR. SHAPIRO: You're right. May take and may
17 result in liability. And my absolute statement is a
18 personal reflection upon my feeling that the Paterno court
19 went too far, which I think Mr. Tabor would agree with.
20 But it's not clear that there is liability in all
21 circumstances. And I can envision many circumstances
22 where there would be no liability.

23 But let's assume --

24 LEGAL COUNSEL CAHILL: That's hopefully a new
25 levee recently built with the proper design.

1 MR. SHAPIRO: Correct, right.

2 So let's, for a moment of this example though,
3 assume that there would be inverse condemnation liability
4 from a flood. And then the question is, where a JPA is
5 liable in inverse condemnation, would its member agencies
6 also be liable for the actions of the JPA?

7 And here there is no clear answer, because
8 there's no case law on this issue at all to allow us to
9 interpret it.

10 And for those who are interested, if you have the
11 master memo that we prepared, there's a table on the back,
12 by the way, that summarize each of these six
13 circumstances, which would be a useful reference.

14 But it's my view that on its face, Government
15 Code 6508.1 --

16 SUBCOMMITTEE MEMBER RIE: Mr. Shapiro, can I stop
17 you for a second.

18 MS. SHAPIRO: Yes.

19 SUBCOMMITTEE MEMBER RIE: I don't think that
20 document's posted on our website.

21 Would anybody like a copy of Mr. Shapiro's legal
22 opinion?

23 MR. SHAPIRO: And I have -- I'd be happy to
24 distribute copies. This was distributed within the public
25 agency community, but --

1 SUBCOMMITTEE MEMBER RIE: May I have a copy?

2 MR. SHAPIRO: -- not everyone may have it.

3 EXECUTIVE OFFICER PUNIA: We have more copies
4 here if someone needs a copy.

5 MR. SHAPIRO: And I'm just going to note in the
6 record -- Teri, I'm going to modify something I said a
7 little bit. This isn't my opinion. And I say that only
8 because an opinion letter in California law is an opinion
9 offered by an attorney of one client for the legal benefit
10 and reliance of another party. And I'm not offering this
11 as an opinion where the Rec Board could sue me if I'm
12 wrong.

13 SUBCOMMITTEE MEMBER RIE: Okay. Let the record
14 reflect that this is not a legal opinion.

15 SUBCOMMITTEE MEMBER DOHERTY: What do you call
16 it? It is just a --

17 MR. SHAPIRO: It's a briefing memo. This goes to
18 the question that Butch noted at the beginning, which is:
19 What is my role here? My role is I've been authorized by
20 my clients to try to educate everyone. Hopefully, we all
21 come to agreement on what the law is.

22 SUBCOMMITTEE MEMBER RIE: Okay. So we will not
23 rely on this opinion -- this set of facts.

24 MR. SHAPIRO: I hope you rely on your counsel,
25 who will agree with this.

1 SUBCOMMITTEE MEMBER DOHERTY: Perhaps.

2 MR. SHAPIRO: Perhaps.

3 SUBCOMMITTEE MEMBER RIE: She doesn't have to
4 comment on that.

5 LEGAL COUNSEL CAHILL: Not all of it. But this
6 first part we're --

7 SUBCOMMITTEE MEMBER RIE: Please proceed.

8 MR. SHAPIRO: Thank you.

9 So returning for a second back to this issue of
10 inverse condemnation. You'll recall the Government Code
11 Section 6508.1, although it says 3508.1, was the general
12 rule that member agencies are not liable for the
13 liabilities of the JPA if the JPA agreement says that
14 they're not.

15 And the only statutory exception was torts, which
16 we've already talked about. So one would think that
17 inverse condemnation would fit into the general rule, just
18 like contract liability, and that if a JPA is liable in
19 inverse condemnation, its member agencies would not be
20 liable in inverse condemnation, because Section 6508.1
21 says so. That would be the common, simplistic view of the
22 matter.

23 That simplistic view is affected by two things:

24 The first is, is that inverse condemnation is a
25 constitutional cause of action. 6508.1 is a statutory

1 limitation. The Legislature doesn't have the ability by
2 statute generally to limit constitutional rights. And so
3 a court might look at this and say, "Are we going to
4 interpret 6508.1 as immunizing member agencies when the
5 Constitution is trying to make someone liable?"

6 The second factor that complicates this is that
7 the courts have been very clear in those inverse
8 condemnation cases where there has been liability that
9 someone is responsible. And the courts have almost gone
10 out of their way to say government has harmed individuals;
11 therefore there will be someone responsible. And in the
12 case of Aikens, that someone was the State of
13 California -- excuse me -- in the case of Paterno, that
14 someone was the State of California.

15 So, this area is an unknown. It's my belief that
16 if the JPA is still in existence, a court would honor
17 Government Code Section 6508.1 and say, "The JPA acted.
18 There was liability from the JPA. The JPA's still around
19 to make people whole. Therefore, we're not going to make
20 the member agencies liable."

21 It's also my belief that if the JPA had been
22 dissolved, the Court would look and say, "The JPA created
23 liability. The JPA got out of business to protect itself.
24 The Constitution demands that someone pay. Therefore,
25 we're going to look to the member agencies."

1 So this is an unknown. But that's my personal
2 prediction on what would happen.

3 LEGAL COUNSEL CAHILL: Scott, I think the first
4 slide is right probably, that inverse is not considered to
5 be tort. So it falls under 6508.1. So that if somehow
6 the JPA, which is carrying the ball on design and
7 construction of the project, did something sufficiently
8 unreasonable that it was held liable in inverse, I think
9 that 6508.1 would not pass that on to the member agencies.

10 And I also think the local people are going to
11 look around for someone to sue, and the State is going to
12 be their big target.

13 And so, you know, the question here is -- one of
14 the questions is -- when Scott made his presentation in
15 November, he said, "Is it fair that these member agencies,
16 that aren't really running the ship, should be liable when
17 they've done nothing wrong?" And I ask you the flip, is
18 it right that the State, which wasn't taking the lead in
19 construction and design, should be stuck with the bag when
20 the JPA members formed it and, in fact, in some way
21 governed it and were responsible for forming it and
22 keeping it going and letting it build these projects?

23 I think Scott is right, that the inverse thing is
24 still somewhat uncertain. But I think when we -- it came
25 up last time, the question was, you know, was that in that

1 tort liability exception? And I think we're in agreement
2 that it isn't. And what would happen -- and I'm not even
3 sure. I think I probably agree with Scott's conclusion
4 that if the JPA were liable in inverse, the Court quite
5 likely would not pass it on to the members. Which means
6 if you want it passed on to the members, you have to put
7 it in your agreement -- get them on the agreement.

8 And what happens if it's out of existence, I
9 think is -- as he said, there's absolutely not a single
10 case on this out there.

11 SUBCOMMITTEE MEMBER RIE: Okay. So let's say the
12 member agencies agree to be responsible for inverse and
13 they sign the agreement, and there's a case where someone
14 is suing for inverse. And you have the local agency and
15 reclamation district, and they have agreed to accept that
16 type of liability, and the JPA is out of existence. Now,
17 similar question to my previous question: Is it likely
18 that the Court would find those local agencies responsible
19 and liable, even though they signed the agreement, if it
20 wasn't their actions that caused the inverse?

21 MR. SHAPIRO: And my answer is the same as the
22 last example you raised, which is it goes to the
23 enforceability of the indemnity provision. And the issue
24 that I highlighted, which we're going to come up to soon,
25 which is, is it against public policy for one party to

1 agree to indemnify another, where the first party has no
2 wrongs at all? And that's, in essence, the debate we're
3 going to have.

4 I have to say that, you know, it's important to
5 realize that the law is very different, depending -- in my
6 view, depending upon whether the JPA member agencies have
7 fault of their own. And I think what Paul is going to
8 tell you when we get to it is, if the member agencies have
9 faults, then insurance is available, indemnities work.
10 It's when the JPA members don't have any faults that this
11 idea of the State being completely protected by relying on
12 indemnities, I think it becomes a very weak argument. And
13 while I can't tell you they're unenforceable, I can, I
14 think, raise enough concerns that will cause you to wonder
15 whether it's enforceable.

16 LEGAL COUNSEL CAHILL: You know, and I think
17 fault is a tricky concept, because inverse isn't based on
18 fault. You know, the inverse is based on unreasonable
19 action under six factors in a California Supreme Court
20 case.

21 But the point is the local agencies formed this
22 JPA. They appoint the members to the governing board.
23 Even though no single local agency has a majority on the
24 governing board, collectively they've appointed the whole
25 board. And the board has chosen the design, chosen the

1 contractor, or whatever. So it may not be right to say
2 those local agencies -- it may not be right to say that
3 they committed a fault, but they were, to a certain
4 degree, in control of the process. I mean, they formed
5 the JPA. They all approved going forward with the
6 project.

7 SUBCOMMITTEE MEMBER RIE: But they would have --
8 do you have to find that they did something unreasonable
9 to make them liable?

10 LEGAL COUNSEL CAHILL: Well, in inverse -- to be
11 liable in inverse, there has to be an unreasonable action
12 by someone. And part of the thing here I guess too is, is
13 that the -- why would the Board know -- well, the reason
14 the Board is asking for these indemnities, the State law
15 tells us to. State law says we agree that we'll indemnify
16 the Corps, and it will do the O&M. And then we should get
17 similar agreements from the locals to us. So it's not
18 like the Board is making this up out of cold cloth.

19 And so the question for you is, you know, how
20 likely is it that if you sign an agreement with the JPA
21 only, that you will actually get a long-term substantial
22 partner able to live up to the terms of the agreement? Or
23 do you need to be sure there will be somebody long term
24 and substantial to have the member agencies on as well?

25 MR. SHAPIRO: And we'll have lots of later slides

1 to specifically talk about this topic.

2 SUBCOMMITTEE MEMBER DOHERTY: On page nine of
3 your brief: "Likewise, before entering into the contract,
4 the contracting parties have the opportunity to structure
5 the contract to require that another entity or entities
6 take on the JPA's obligations, should the JPA dissolve
7 while the contract is in effect."

8 So to me there is liability there.

9 MR. SHAPIRO: There is the legal ability to --
10 for the contracting party to say, "I'm not satisfied just
11 signing up with the JPA," that's right. And so in the
12 example -- this is in the contract example, but it makes
13 complete sense in what we're talking about. So if, for
14 example, Kleinfelder is approached by SAFCA to do some
15 geotechnical work, and Kleinfelder says, "I'm concerned
16 that SAFCA doesn't have the money to pay me. I'm not
17 going to sign the agreement unless the City of Sacramento
18 signs as well." Under that circumstance, the City of
19 Sacramento can say, "You know what. I don't really want
20 to sign this guaranty. SAFCA, go find another geotech
21 guy. Go hire GEI, go hire someone else."

22 From a global perspective, it's a little bit
23 different than the relationship that the JPAs have to the
24 Board. We come to the Board to get a permit. If you
25 require the member agencies to sign and they won't sign,

1 we don't have someplace else to go. We're not like
2 Kleinfelder or GEI where there are alternatives. And so
3 it's that unequal bargaining position issue that raises
4 the cases and statutes we'll talk about a little later
5 which question whether it's against public policy.

6 And I'm not saying it is against it. I'm saying
7 there's a big question in my mind that it may be.

8 --o0o--

9 MR. SHAPIRO: The one other thing I want you to
10 note before we moved off of inverse condemnation - and I
11 didn't put it in a PowerPoint, but it is in the memo - is
12 the Board has over time been concerned whether the JPAs
13 will continue to exist. Two of the JPAs, Three Rivers and
14 SJAFCA, the San Joaquin Area Flood Control Agency, have
15 language in those JPA agreements that make clear that they
16 can't dissolve the JPA so long as the JPA has outstanding
17 obligations. In one case, I think the phrase is a
18 material obligation. I don't remember what the other
19 phrase is.

20 It's my belief that the commitments that the JPAs
21 make to the Board is such a material obligation. So Three
22 Rivers has promised to indemnify the Board, it has
23 promised to operate and maintain the project. It's my
24 belief that Three Rivers cannot go out of existence unless
25 the Board let Three Rivers out of those obligations. I

1 believe the same is true for SJAFCA, the San Joaquin Area
2 Flood Control Agency.

3 Those restrictions do not exist for West
4 Sacramento, Sacramento and Sutter Butte. Although, I know
5 that SAFCA has at least said if that is a concern of the
6 Board, that SAFCA would entertain amending its JPA
7 agreement to put the same language in, because it's not
8 its intent to instantly dissolve and disappear.

9 Sutter Butte has yet to even get near this issue.

10 We haven't talked about this with West
11 Sacramento. I'm not saying they would or wouldn't have a
12 problem with it.

13 But I do at least want to put on the table that
14 we looked at this issue of the ability to dissolve, and
15 have come to the conclusion that some do have that, some
16 don't have it, and there are ways of ensuring that they
17 can't dissolve at all. The consequence of them
18 dissolving, when they said they wouldn't, would be they
19 would be breaching their obligation to the third party
20 beneficiary, the Board. And therefore, because of that
21 breach, I believe the member agencies themselves would be
22 liable, because the member agencies would have breached
23 the JPA agreement.

24 And, anyway, I don't know if you had a chance to
25 even think about that issue, Ginny.

1 LEGAL COUNSEL CAHILL: Just started to think
2 about it. But it makes sense.

3 SUBCOMMITTEE MEMBER RIE: Do you want to move on
4 to No. 5?

5 Does anybody have any comments?

6 MR. SHAPIRO: I actually have a little bit more
7 in No. 4, and that's to start talking about how those six
8 rules apply now that we start looking at actual Board
9 circumstances.

10 And on Slide No. 8, what I've done is I've quoted
11 the Board's Standard Condition No. 10.

12 I should say, as the first bullet point makes
13 clear, all of these examples we're talking about right now
14 assume there isn't a specific obligation that the Board
15 imposes on member agencies to sign up. This is back to
16 pre-2005, before the Board ever came up with the idea of
17 seeking specific indemnities from member agencies.

18 And if you've looked carefully at your permits,
19 you'll see the first 12 are in small prints, and then 13
20 to whatever number are in bigger prints. And it's because
21 the way it's set up, 1 through 12 are your standard
22 conditions, and then 13 through whatever are your special
23 conditions. As a practical matter, most of the special
24 conditions are now standard conditions. But 1 through 12
25 are your standard conditions.

1 And, Ward, I don't know, were you part of the
2 team that developed the original 12?

3 DWR ASSISTANT CHIEF COUNSEL TABOR: I was.

4 MR. SHAPIRO: So we have some history with us if
5 we have questions about how they came up.

6 SUBCOMMITTEE MEMBER RIE: Mr. Hodgkins.

7 SUBCOMMITTEE MEMBER HODGKINS: Can I ask a
8 question so that I understand this provision.

9 I understand wanting the State of California to
10 be protected. And I understand wanting the United States
11 of America to be protected, because that's consistent
12 with, you know, the concept of the Project Cooperative
13 Agreements and all of that.

14 MR. SHAPIRO: Yeah, because you, the Board, have
15 promised to protect the United States.

16 SUBCOMMITTEE MEMBER HODGKINS: Yes, we have.

17 Okay. But then it goes on to include local
18 districts or other maintaining agencies and the officers,
19 agents or employees thereof. It seems like you're
20 indemni -- who is that that we're asking you to --

21 DWR ASSISTANT CHIEF COUNSEL TABOR: Well, keep in
22 mind, this is the standard permit language for any kind of
23 an encroachment. And one of the main players out there --
24 if you give an encroachment permit to a property owner,
25 the likely conflict is going to be between the property

1 owner and the maintaining agency. So this provides
2 protection to that maintaining agency.

3 SUBCOMMITTEE MEMBER HODGKINS: Okay.

4 MR. SHAPIRO: Yeah, I agree. And I think this
5 highlights --

6 SUBCOMMITTEE MEMBER HODGKINS: It's a little
7 crazy when it's an encroachment permit for a modification
8 to the project.

9 MR. SHAPIRO: Yes. And this highlights my
10 continuing request that the Board get to Tier 3 of your
11 regulation changes, because we have all of these vestiges
12 of a relationship that works for everything that's on your
13 consent calendar, but doesn't work so well for the meat of
14 what you decide now, which are encroachment permits for
15 levee modifications, when your permits generally say that
16 we have to take out the encroachment if you tell us to.
17 It doesn't work well when it's a slurry wall, for example.

18 So going back, Standard Condition No. 10, as you
19 identified, Butch, it says if any claim of liability is
20 made against the State of California or these other
21 people, the permittee shall defend and shall hold each of
22 them harmless from each claim.

23 Now, this language, in my view, is overbroad - my
24 apologies to my friend, Mr. Tabor - because of a number of
25 reasons. Just one that I'll highlight here and we'll talk

1 about the rest later. It doesn't limit the liability to
2 arising out of the permit. As drafted, if someone sues
3 the State of California for failing to make a tax refund,
4 this would almost suggest that the permittee has to
5 indemnify the State for the loss associated with failing
6 to make the tax refund, because it's not in any way
7 limited to arising out of the permit.

8 Now, I personally believe that a court would
9 impose that provision. But if one of the actions that
10 comes out of this exercise is that you revise your
11 conditions to update them, I would encourage you to put in
12 the phrase "arising out of the permit," because I think it
13 ties it together a little bit better.

14 DWR ASSISTANT CHIEF COUNSEL TABOR: If you read
15 your regulations on this point, which are found in Section
16 16(j), I think the regulation does a better job of getting
17 to the point that Scott just made. It focuses on arising
18 out of the failure or the -- it's directly related to the
19 permit and the use is permitted by the permit.

20 MR. SHAPIRO: So the final point on this Slide
21 No. 8 is it's our belief that this indemnity, which I
22 consider a regulatory indemnity, it's an indemnity
23 required by a regulatory relationship, would be treated by
24 the courts as a contractual indemnity.

25 There's only two types of indemnity. There's

1 implied indemnity and there's expressed indemnity. And
2 although this isn't actually an agreement, this is a
3 permission for the permittee to do work. The courts I
4 believe would treat this as a contractual indemnity. And
5 the importance of that is -- we talked about the six rules
6 before, and two of the rules dealt with contractual
7 circumstances. Then those become the two critical rules
8 we look at while we're trying to figure out the effect of
9 this. And if a JPA indemnified the State for a
10 contractual indemnity and thus the JPA has liability
11 through a contractual indemnity, are the member agencies
12 themselves liable?

13 And as you'll recall from earlier - I'm jumping a
14 little bit ahead - the rule on contracts is the member
15 agencies are not liable. So this explains, if you will,
16 the Board's desire, three to four years ago, to start
17 having expressed contractual promises from member
18 agencies, because you don't get anything from the member
19 agencies under your standard provision and the way it
20 intersects with State law.

21 Ginny, is that consistent with your
22 understanding?

23 LEGAL COUNSEL CAHILL: I think so.

24 --o0o--

25 MR. SHAPIRO: And this is -- I'm turning to slide

1 9, which is just the continuation of exactly that
2 argument. Because this regulatory indemnity is treated as
3 contractual indemnity, the rules of Section 6508.1 apply.
4 And, therefore, the State is found liable for flood
5 damages, the JPA would be contractually required to
6 indemnify the State. And because the indemnity is
7 contractual under 6508.1, the member agencies are not
8 liable.

9 Make sense so far?

10 SUBCOMMITTEE MEMBER RIE: You keep saying 6508,
11 but it says 3508.

12 MR. SHAPIRO: Yeah, Paul pointed out that at 11
13 o'clock at night when I finalized it, I missed the typo
14 that I repeated over and over and over again.

15 SUBCOMMITTEE MEMBER RIE: Okay.

16 MR. SHAPIRO: So I don't have the section with
17 me. I don't know if Ginny or Ward does. But it's one or
18 the other.

19 DWR ASSISTANT CHIEF COUNSEL TABOR: Sixty-five
20 sounds right to me.

21 MR. SHAPIRO: Yeah, in my briefing memo on page 4
22 it's correctly identified as 6508.1.

23 SUBCOMMITTEE MEMBER RIE: Okay. Thank you.

24 --o0o--

25 MR. SHAPIRO: So if we turn to slide 10, I want

1 to contrast what we just talked about. And, Butch, this
2 goes back to your comment earlier, that it kind of depends
3 upon who gets sued. So in the example I just gave -- and
4 I'll pop back up to 9 just for a second.

5 In the example I gave on slides number 8 and 9
6 together, the State is sued and found liable. The State
7 says, "Hey, JPA, under Condition No. 10, you're going to
8 indemnify me."

9 "And, by the way, we," the State, "want the
10 member agencies too. Can we get to them?" No, we can't
11 because our standard indemnity is contractual under 6508.1
12 and we can't get to the member agencies.

13 Contrast that to Slide No. 10. Let's see if the
14 same plaintiffs sues the State and the JPA and there's
15 liability. Well, in that case, the JPA is liable in
16 torts. And recall from the very beginning of the
17 presentation, where the JPA is liable in tort, there's an
18 expressed Government Code provision that makes the member
19 agencies liable in tort. So in this circumstance, because
20 the plaintiffs sued the State and the JPA, now the member
21 agencies are liable. But they're liable because the
22 plaintiffs sued the JPA, not because the plaintiffs sued
23 the State.

24 So there's a disconnect. And who's liable is
25 based upon a very simple circumstance of whether the

1 plaintiffs elected to sue the State alone or the State and
2 the JPA.

3 SUBCOMMITTEE MEMBER RIE: So, Mr. Shapiro, just
4 because you sue a JPA and the State, doesn't it all depend
5 on who was negligent?

6 MR. SHAPIRO: Yes. And my oversimplified example
7 is set up assuming both were -- both acted improperly in
8 some way. That tort liability existed as against both of
9 them.

10 SUBCOMMITTEE MEMBER RIE: Okay. And in that
11 particular case, if the JPA is liable or negligent, then
12 the member agencies are also liable?

13 MR. SHAPIRO: That's correct.

14 SUBCOMMITTEE MEMBER RIE: Okay.

15 --o0o--

16 MR. SHAPIRO: My next slide moves us to Agenda
17 Item 5. And I don't want to go there yet if there's still
18 more questions on what we hit on 4. So --

19 SUBCOMMITTEE MEMBER RIE: Questions, comments?

20 MR. SHAPIRO: Okay. So as you can see on my
21 slide for 5, my proposal is that we do 6 first. I think
22 it makes more sense to do 6, which deals with what
23 indemnities are enforceable and insurable, before we get
24 to the issue of what JPA members can do. Because it's
25 good to have the base rules and then you apply it. Then

1 you can look at what they're actually doing and can do.

2 So with permission, I would jump to 6.

3 SUBCOMMITTEE MEMBER RIE: Sure.

4 --o0o--

5 MR. SHAPIRO: Slide 12 is simply a repeat of the
6 Agenda Item No. 6.

7 --o0o--

8 MR. SHAPIRO: Slide 13 we start getting into
9 indemnity and insurance. And I'm going to take the lead
10 here. But Paul Hight, again, is available to fill in the
11 holes or any of the specific or detailed questions you
12 have. Much of what's here he has fed to me. And so I'm
13 just a puppet for some of this.

14 MR. HIGHT: Shoot him first though.

15 (Laughter.)

16 MR. SHAPIRO: Yes, Puppet Master.

17 Turning to slide 13. A fundamental principle of
18 insurance is that you can only purchase insurance which
19 protects the insured from liability based upon the fault
20 of the insured.

21 In other words, SAFCA can purchase an insurance
22 policy that will pay, but only when SAFCA was at fault in
23 some way, shape, or form. SAFCA can't buy -- Paul, tell
24 me if I'm overstating this -- unless it goes for some
25 special policy from Lloyds of London type of thing, SAFCA

1 can't buy a policy that would result in SAFCA's policy
2 paying out where SAFCA is not liable in some way, is not
3 at fault in some way.

4 And so much of the dialogue we're going to have
5 is in figuring out who is and isn't at fault. And usually
6 it's reasonably clear. Although I agree with Ginny, that
7 it's not completely clear how the concept of fault
8 overlays over inverse condemnation, which is not a
9 fault-based concept. It is an unreasonable-plan-based
10 concept. And my belief is, is that they would be
11 interchangeable, but we don't have any law on that.

12 LEGAL COUNSEL CAHILL: Scott, let me ask you a
13 question. The average home owner's insurance is not
14 insuring us just against fault. It's insuring us also
15 against things that we have nothing to do with. If
16 lightning strikes my house and it burns down, I haven't
17 been at fault, but I would assume I would have coverage.
18 Or is that an act of God and I wouldn't have coverage?

19 MR. HIGHT: That's a first-party property
20 coverage, and there is no exclusion on that. But we're
21 talking about liability, which is all fault based.

22 LEGAL COUNSEL CAHILL: So we're talking about
23 liability insurance.

24 MR. HIGHT: Right.

25 LEGAL COUNSEL CAHILL: Okay.

1 MR. SHAPIRO: Now, just to make it clear, in the
2 first bullet there's also this parenthetical phrase "and
3 other additionally named parties." As most of you
4 probably know, you can get a policy -- an insurance
5 policy, which not only protects the insured, but also
6 protects other explicitly named parties. And so it's very
7 common, for example -- I'll keep picking on Kleinfelder.
8 SAFCA might hire Kleinfelder to do some borings and SAFCA
9 might say, "Kleinfelder, in addition to you having
10 insurance that protects you," Kleinfelder, "so we can sue
11 you if we need to and you can pay, we also want to make
12 sure that your policy specifically names SAFCA as an
13 additional insured." But even where there's an additional
14 insured named, you still need to go back and determine
15 whether the original party has some fault based for the
16 insurance policy to apply.

17 And so the second bullet that's up there on Slide
18 No. 13 are two quotes from policies that Paul located that
19 explain or demonstrate the fault-based nature of it.

20 I did not include all the language and then the
21 references and the definitions that are in the briefing
22 memo, but Paul or I can walk you through that if you want.
23 But those are the examples that insurance is fault based
24 in liability circumstances.

25 Paul, do you want to add anything to that?

1 SUBCOMMITTEE MEMBER RIE: Did you get his last
2 name?

3 THE REPORTER: It's Hight, right?

4 MR. HIGHT: Hight, H-i-g-h-t.

5 SUBCOMMITTEE MEMBER RIE: I have a quick
6 question. Can you explain that additional insured? When
7 you have a Kleinfelder and you're naming a public agency
8 as an additional insured, can you describe how that
9 relates to this discussion?

10 MR. HIGHT: Well, I'll be glad to.

11 There's several reasons why a party would want to
12 be named as additional insured. And, first of all, it's
13 possible that the indemnity provision will fail. The
14 Court might throw it out. So what backstop do you have?
15 Well, if you're named as additional insured, you have
16 certain rights that are actually in the policy via an
17 endorsement. And it says Kleinfelder is naming another
18 party, SAFCA, as an additional insured. So if the
19 indemnity provision between Kleinfelder and SAFCA failed,
20 or even if it did operate, you'd still have the rights
21 under Kleinfelder's insurance policy. And SAFCA could go
22 back and request defense or indemnity protection under
23 Kleinfelder's insurance policy. So that's the reason for
24 it.

25 SUBCOMMITTEE MEMBER RIE: But does that

1 additional insurance policy protect SAFCA if SAFCA is
2 liable?

3 MR. HIGHT: Okay. And I'll get to that.

4 There's a reason why, and I'll show you how it
5 operates. Kleinfelder would have to have some fault, have
6 to be shown that they had some fault for even the
7 additional insured endorsement to trigger protection for
8 SAFCA. So SAFCA could not go out and say, "Okay," to
9 Kleinfelder's insurance company, "you protect us," but
10 Kleinfelder has no fault. They can't do that. But if
11 Kleinfelder has fault, then SAFCA can go to Kleinfelder's
12 insurance company and say, "We want protection. And
13 here's the fault issue at hand." And if the insurance
14 company agrees, then they'll provide protection for SAFCA.

15 MR. SHAPIRO: And that would be even for third
16 parties suing SAFCA. The third party might sue SAFCA
17 saying, "Hey, you screwed up on these borings." SAFCA
18 goes to Kleinfelder's insurance company and says,
19 "Kleinfelder did the borings. They did something wrong.
20 They had faults. I," SAFCA, "am an additional insured.
21 Therefore, you," insurance policy, "cover me," SAFCA,
22 "against claims by third parties."

23 SUBCOMMITTEE MEMBER RIE: Okay. But if
24 Kleinfelder had no fault and no negligence, it's not going
25 to be applicable?

1 MR. HIGHT: SAFCA would get no value out of that

2 SUBCOMMITTEE MEMBER RIE: Okay.

3 SUBCOMMITTEE MEMBER HODGKINS: But --

4 SUBCOMMITTEE MEMBER RIE: Mr. Hodgkins.

5 SUBCOMMITTEE MEMBER HODGKINS: -- let me -- thank
6 you. I'm sorry.

7 SUBCOMMITTEE MEMBER HODGKINS: Suppose this is a
8 construction contract. And in these construction
9 contracts I'm going to assume that SAFCA isn't also
10 insured by the contract. Okay. Now, the Corps plays a
11 role in these projects. And suppose the Corps directs or
12 refuses to approve something that then results in an
13 accident and there's liability. It's the Corps's fault.
14 But the indemnification -- because it's not SAFCA's fault,
15 the whole business of that insurance providing any
16 protection for parties here is illusory?

17 MR. HIGHT: Well, not entirely. If there is no
18 fault that's proven, there's still the issue of defense.
19 And a policy that SAFCA has or any other parties that's
20 involved would still provide defense to the point that
21 there's some decision made whether or not there's fault.
22 So there's value in having insurance even if ultimately
23 there's no fault proven, because the defense costs can be
24 substantial in and of themselves.

25 But the key would be whether or not a contractor

1 working on behalf of SAFCA has even some degree of fault.
2 That's all that's really necessary there. Once that
3 degree of fault is established, then the contractor would
4 be on the hook through their insurance program, and SAFCA
5 probably would be brought in as well, because they hired
6 the contracting firm or the consulting firm. And they may
7 have some fault in the matter. Maybe they hired a firm
8 that was not qualified to do the work.

9 SUBCOMMITTEE MEMBER HODGKINS: Okay. Or they
10 should have raised the issue -- the contractor should have
11 raised the issue, "The Corps's not a party to this
12 contract. They can't tell us anything." And so should
13 SAFCA.

14 MR. HIGHT: A negligent act, error, or omission
15 is generally how an insurance policy will be triggered.
16 So an omission, when there was some duty that they should
17 have done something, could, in fact, trigger the insurance
18 coverage.

19 SUBCOMMITTEE MEMBER HODGKINS: Okay.

20 MR. SHAPIRO: So, Butch, building on your
21 question, with a specific example.

22 Return for a second back to 1986 and the Paterno
23 lawsuit. The State of California was sued and Reclamation
24 District 784 was sued. And Reclamation District 784 had
25 an insurance policy. And Reclamation District 784 by

1 statute and maybe by contract - I don't recall - had
2 agreed to provide indemnity to the State for failures
3 arising out of 784's actions.

4 The Court, in the final decision of Paterno,
5 found the State was liable, based on design liability
6 basically, and found that 784 had no liability. In that
7 circumstance, where there's no fault on 784, and there's a
8 hundred percent fault on the part of the State - whether
9 we agree there was or wasn't, the Court said there was -
10 if the State then says, "784, you've agreed to indemnify
11 me, give me money out of your insurance policy," and 784
12 had gone to its insurance policy, the insurance policy --
13 the insurer would look and say, "You weren't at fault.
14 We're not paying the State."

15 And the value of the indemnity in that case is
16 only the two pickup trucks and five shovels that RD 784
17 has.

18 SUBCOMMITTEE MEMBER DOHERTY: And the lawn mower.

19 MR. SHAPIRO: And the lawn mower.

20 But the real value of indemnities tends to be
21 insurance. But what we're doing with some of the
22 indemnity provisions that are in permits is we're not
23 making sure that they align with the insurance coverage.
24 And that's what we're going to get into in a few minutes.

25 --o0o--

1 MR. SHAPIRO: So continuing this discussion,
2 moving on to slide 14 - and this is just to make it
3 clear - the promise of indemnity itself doesn't create
4 fault. In other words, in the example of 784 and the
5 State of California, where the court said it had no fault,
6 because it didn't perform O&M improperly, the promise by
7 784 to indemnify the State doesn't create fault on the
8 part of 784 to trigger the insurance. And that's what
9 this Slide No. 14 says, that the promise of indemnity
10 itself doesn't create fault.

11 SUBCOMMITTEE MEMBER HODGKINS: Okay.

12 SUBCOMMITTEE MEMBER RIE: So if you sign a
13 contract or an agreement promising that you're going to
14 provide that --

15 MR. SHAPIRO: -- you'll provide indemnity --

16 SUBCOMMITTEE MEMBER RIE: -- then it wouldn't be
17 applicable?

18 MR. SHAPIRO: The indemnity may still be
19 applicable, but there's no insurance to back it up.

20 SUBCOMMITTEE MEMBER RIE: Okay.

21 EXECUTIVE OFFICER PUNIA: So, Scott, in the
22 Paterno case, had the decision been that the levee failed
23 due to O&M, then they were on the hook with us?

24 MR. SHAPIRO: That's correct. If it had been O&M
25 and the State had said, "784, pay up on your \$1 million

1 policy to cover our \$486 million worth of loss," then the
2 insurance company would have said, "Okay, the Court found
3 fault on the part of 784 and we will pay on this policy."

4 SUBCOMMITTEE MEMBER RIE: Before you go on, was
5 Yuba County sued in that particular case?

6 MR. SHAPIRO: No, Yuba County was not in the
7 levee improvement business, and Three Rivers did not exist
8 at the time.

9 SUBCOMMITTEE MEMBER RIE: And they weren't named
10 in the lawsuit?

11 MR. SHAPIRO: I have no knowledge that they were.

12 Ward was with the State then. Do you have any
13 recollection?

14 DWR ASSISTANT CHIEF COUNSEL TABOR: I don't know.

15 MR. SHAPIRO: I will tell you that in the Aikens
16 case, which was the '86 liability arising out of flooding
17 in Rio Linda and --

18 DWR ASSISTANT CHIEF COUNSEL TABOR: -- Strawberry
19 Manor.

20 MR. SHAPIRO: -- Strawberry Manor - thank you -
21 there were five defendants: The State of California,
22 Reclamation District 1000, American River Flood Control
23 District, the County of Sacramento, and the City of
24 Sacramento.

25 The County and the City were sued on the basis of

1 approving development in floodplains and of approving
2 development which increased runoff, thus causing flooding.
3 Both parties settled very early on for very little money
4 just to get out. And there's no determination of whether
5 they would have had liability.

6 --o0o--

7 MR. SHAPIRO: So if we move to slide 15, what we
8 propose here is a new indemnity clause that the Board
9 might consider adopting. And this indemnity was
10 constructed by Paul and myself, based on somewhat standard
11 indemnity language, that he's worked with me trying to
12 tailor it to this particular circumstance. And I've
13 highlighted two particular aspects of it that I wanted to
14 talk about for a second.

15 The first is the phrase in the middle, "arising
16 out of this permit." You recall my criticism of your
17 current language that it doesn't tie it at all to
18 activities and Ward identifying that even your regulations
19 speak about it arising. And so that would address that
20 issue.

21 But the second bolded phrase, which reads, "only
22 to the extent caused by the negligent or wrongful act or
23 omission of the permittee," goes to the fault-based issue
24 we've been discussing.

25 If your indemnity said, "only to the extent

1 caused by the negligent or wrongful act or omission of the
2 permittee," then the indemnity would always -- I shouldn't
3 say always -- it seems to us the indemnity would almost
4 always line up with insurance coverage, because insurance
5 coverage is fault based and the indemnity would be fault
6 based too.

7 LEGAL COUNSEL CAHILL: But this is not likely to
8 pick up inverse condemnation, this language?

9 MR. SHAPIRO: It's a great question, Ginny. And
10 I don't know. It certainly wasn't my intent to exclude
11 inverse.

12 LEGAL COUNSEL CAHILL: That's right.

13 MR. SHAPIRO: And if there was a phrasing -- for
14 example, we might put the phrase "by the negligent,
15 wrongful, or unreasonable acts or omissions of the
16 permittee," then that might address it since that seems to
17 be the magic phrase and --

18 MR. HIGHT: May I address this condemnation a
19 little bit in light of insurance, because I think
20 everybody's looking for an insurance guy to say whether or
21 not it's covered. So let me -- oh, this is SAFCA's
22 policy, by the way.

23 MR. SHAPIRO: And you're about to read from it?

24 MR. HIGHT: I'm about to read from it. And it
25 addresses inverse condemnation. And it's under Exclusion

1 G. So everything that is here is excluded.

2 "Liability arising out of or in connection with
3 the principle of eminent domain, condemnation proceedings,
4 or inverse condemnation, by whatever name, regardless of
5 whether such claims are made directly against the covered
6 party" -- in this case it would be SAFCA -- "or by virtue
7 of any agreement entered into by or on behalf of the
8 covered party."

9 And if I stopped right there, we'd have to say,
10 okay, it's not covered by insurance. But like most
11 insurance policies, there are exceptions to the
12 exclusions. So now --

13 MR. SHAPIRO: Now we read what is covered.

14 MR. HIGHT: Now, think about this:

15 "This exclusion does not apply to direct physical
16 injury to or direct destruction of third-party tangible
17 property caused by an occurrence, even though a legal
18 theory upon which a claimant seeks recovery is the
19 principle of inverse condemnation."

20 So like a lot of insurance policies, it gives
21 coverage, then it excludes it, and then it will provide
22 some limited exceptions to narrow it down. So --

23 SUBCOMMITTEE MEMBER HODGKINS: Well, what does
24 that mean?

25 (Laughter.)

1 MR. HIGHT: Well, we'll need a claim to really
2 know. I do know this - and I don't have all the
3 particulars - but I know that another county -- and I was
4 speaking to the risk manager awhile back, and we were
5 talking about this coverage -- they have a situation where
6 the original complaint alleged inverse condemnation. But
7 in fact the county - and I'm not going to name any names
8 here - allowed some water to go into this individual's
9 property and apparently damaged it. And there is an issue
10 now that's being looked at by this same insurance carrier
11 on the application of this exception to an exclusion. And
12 I don't know the answer to that because the claim is still
13 open.

14 But the reason the county made that -- they made
15 the case to the insurance company is they feel that there
16 should be coverage because there was physical damage
17 issues here. And so that may trigger the exception to the
18 exclusion.

19 I can't tell you, other than the principle, is
20 it's possible -- as Scott has said, it's possible that
21 there could be coverage under the insurance policy
22 involving flood.

23 MR. SHAPIRO: And I'm not an insurance guy. But
24 my interpretation of the exclusion and then the exception
25 to the exclusion is the exclusion is attempting to make

1 sure that insurance companies aren't liable when
2 government takes property through the normal ways we think
3 of it. And like adopting a regulation saying you have to
4 have a 50-foot setback on your yard and your property's
5 only 60-feet wide, then therefore you can't build a house.
6 But then saying, while we won't pay on inverse
7 condemnation claims, we will pay where there's physical
8 damage such as a flood.

9 MR. HIGHT: Right. But the facts would have to
10 demonstrate whether or not there's a coverage.

11 SUBCOMMITTEE MEMBER HODGKINS: Because -- again,
12 I'm trying to sort through this. But it would seem to me
13 that somebody might sue on the basis of inverse, when the
14 cause of the flooding is a defect in how something was
15 designed.

16 MR. HIGHT: Right.

17 SUBCOMMITTEE MEMBER HODGKINS: Okay. And in that
18 case, it would seem like to me you should expect the
19 insurance to pay.

20 MR. HIGHT: On the defect issue?

21 SUBCOMMITTEE MEMBER HODGKINS: Yeah.

22 MR. HIGHT: Right. Well, there'll be multiple
23 reasons for a claim being made during a lawsuit. But,
24 yeah. I mean, if the insurance company would be obligated
25 to look at all of those possible causes of the damage.

1 SUBCOMMITTEE MEMBER HODGKINS: If not, we ought
2 to be able to convince the -- adopt the inverse and just
3 go to tort.

4 MR. SHAPIRO: Yeah. And there's an example of
5 that, Butch. In 1997, on the San Joaquin system, you'll
6 recall, there was high water and a lot of islands were
7 flooded. And one of the islands flooded was Stewart
8 Tract, which is now River Islands project.

9 And I represented Stewart Tract owner at the time
10 in a claim against the State of California and the
11 adjoining reclamation district, which was RD 2107. And RD
12 2107 had an insurance policy. And the policy had an
13 exclusion for inverse, but it didn't have the exemption
14 bringing it back in. -- the exception bringing it back in.
15 And so the insurance company originally said, "We won't
16 pay any settlement because inverse is excluded." And we
17 said, "But we have five claims against RD 2103, and one of
18 them is negligence and one of them is trespassing and one
19 of them is nuisance, and there's no exception for any of
20 those."

21 And ultimately the insurance company paid a
22 settlement, because of the multiple claims, some being
23 inverse and some being not.

24 LEGAL COUNSEL CAHILL: You know, this is
25 interesting even an aside from the JPA and the members

1 agencies issue. I mean, it's sounding like public
2 agencies don't even know if they'll be covered or not for
3 inverse under their existing policies. I mean, it sounds
4 like SAFCA doesn't know, if it were to be found liability
5 inverse, whether it would even be covered in any case.

6 SUBCOMMITTEE MEMBER HODGKINS: You know, I can't
7 offer any explanation for SAFCA currently. But the first
8 time we saw that policy, candidly we didn't care, because
9 the worst you could do was put us out of business. And in
10 terms of the benefits that SAFCA was getting out of the
11 projects, they far exceeded the potential problems of
12 putting SAFCA out of business.

13 MR. SHAPIRO: And indeed the duty to defend under
14 the policies for many local agencies is the biggest value,
15 because the consequences of flooding will almost always
16 exceed the policy anyway. And it's probably worth having
17 Paul just talk for a moment about: Is this a good policy
18 or a bad policy? Are there better ones that are out
19 there? How much does this cost SAFCA? Are we buying the
20 Chevy and we're not buying the Cadillac?

21 SUBCOMMITTEE MEMBER RIE: And let me add one more
22 thing for you to also discuss. It seems to me most
23 insurance companies do not cover floods. So if you could
24 also talk about the exclusion for flooding. I don't know
25 if that excludes damages from flooding or if you're

1 negligent and you cause flooding.

2 MR. HIGHT: Here, let me -- and let me clarify
3 something. What you're talking about most likely is
4 first-party property coverage. Okay. Your homeowner's
5 policy or even a commercial policy that covers this
6 building here would exclude flood. But that's different
7 than liability. Okay. So if a public entity agency was
8 negligent and flood resulted, that's an entirely different
9 scenario, an entirely different set of legal principles,
10 an entirely different policy that would respond to that
11 kind of a loss event.

12 MR. SHAPIRO: Your first-party property you just
13 described was Ginny's lightning-striking-the-tree example.

14 MR. HIGHT: Right.

15 However, for auto policies most of the time flood
16 is covered, just so you know.

17 (Laughter.)

18 MR. SHAPIRO: In the event of a flood leave your
19 car in your living room.

20 MR. HIGHT: But I was asked by Scott if I could
21 address a couple things regarding insurance. So I guess
22 this is the time to talk about insurance or what?

23 MR. SHAPIRO: You know what, I --

24 MR. HIGHT: Or should I wait?

25 MR. SHAPIRO: I realize I've just got like four

1 more slides before we get to that issue. So maybe if it's
2 okay with the Board, at that time you'll also address the
3 questions I just asked.

4 MR. WINKLER: Do you know what he told me?

5 Steve Winkler, San Joaquin County.

6 The bolded suggested language revisions. And I
7 want to steal Scott's future thunder, because it's going
8 to be covered in a second, I think, or as we move to a
9 different item. And, that is, you know, why there is so
10 much push back on these overreaching indemnity
11 requirements, is, generally speaking, from the colleagues
12 I've spoken with, if these kind of words were in, there
13 would be much less resistance to indemnity provisions.
14 Because instead of sort of us, as local agencies or JPA
15 members, having to take on liability that reaches beyond
16 anything we would do or be at fault for, for instance, the
17 way they operated dams upstream, other agencies, you know,
18 that caused a levee failure, but because we built the
19 levee and had a permit with The Rec Board to do it, we're
20 now liable, is a very objectionable concept.

21 But if it's by virtue of the permitted
22 conditions, and to the extent that we took inappropriate
23 actions, whether it's O&M or design or whatever, I think
24 we're all big boys and agencies and ready to step up and
25 say we're responsible for our actions, but we can't

1 indemnify the State for other people's actions.

2 SUBCOMMITTEE MEMBER RIE: Thank you.

3 Mr. Hodgkins.

4 SUBCOMMITTEE MEMBER HODGKINS: I think an
5 important thing to bear in mind as we try and work through
6 this is that the federal government doesn't look at it
7 that way. And the federal government's position is, if
8 you want -- I'm paraphrasing, probably badly. But if you
9 want the money, you're going to indemnify us and hold us
10 harmless no matter what we do. Is that a fair statement
11 of what they expect?

12 MR. SHAPIRO: It is. But the thing that
13 makes -- that makes that requirement so valuable to them
14 is not the requirement itself, in my opinion, as the fact
15 that the federal government has sovereign immunity and
16 can't be sued for failure of flood projects.

17 So it's not like the federal government is being
18 sued, is liable for half a billion dollars and then is
19 saying, "State, indemnify us." I've always thought of the
20 federal requirement of indemnity to be belt and
21 suspenders, where the belt is the indemnity, but the
22 suspenders are -- in the first place, you can't even sue
23 the federal government for liability arising out of flood
24 coming out a flood project. I don't know if the State
25 lawyers have a different view of that.

1 DWR ASSISTANT CHIEF COUNSEL TABOR: It's
2 certainly applicable to claims based on tort. I don't
3 know if it's been tested for inverse condemnation.

4 MR. SHAPIRO: In New Orleans it was. And it's
5 been thrown out thus far.

6 SUBCOMMITTEE MEMBER RIE: Before I came to this
7 meeting, I typed in Google "hold harmless" and "Army Corps
8 of Engineers." And there was a case on Google where the
9 Texas Attorney General asked the Corps for clarification
10 on their hold-harmless clause. And there is a federal
11 statute you may want to take a look at, you attorneys, and
12 they did clarify what they meant. And they did clarify
13 that they were not asking anyone who signs an agreement
14 with the Corps to hold them harmless from the federal
15 government's acts of negligence, only the person signing
16 the agreement. It would be for their negligence.

17 MR. SHAPIRO: For their fault-based actions?

18 SUBCOMMITTEE MEMBER RIE: Right.

19 So you guys might want to take a look at that.

20 SUBCOMMITTEE MEMBER HODGKINS: That would be a
21 huge step.

22 MR. SHAPIRO: Do you have any notes on that?

23 DWR ASSISTANT CHIEF COUNSEL TABOR: Well, it's
24 the basic provision of Section 103 of WRDA 1986, where the
25 Corps -- section that requires the indemnity but not

1 federal sponsored. But it expressly excludes from that
2 any fault or negligence of the United States or its
3 contractors. So when you read a PCA, our example, it has
4 that exclusion.

5 MR. SHAPIRO: Yes. And what's interesting - if I
6 can do one little jab at the State for a second - is that
7 reasonable provision saying, "We," the federal government,
8 "require indemnity, but not for our own fault," which is
9 what we're saying? That language has not been carried
10 over by the states. The State doesn't say, "but not for
11 our own fault." And we discussed that in the context of
12 PCAs that have come before the Board before.

13 DWR ASSISTANT CHIEF COUNSEL TABOR: Been
14 discussing it with local sponsors for 20 years.

15 (Laughter.)

16 SUBCOMMITTEE MEMBER RIE: But, you know, maybe
17 for next time, you might want to take a look at that. It
18 was the Texas Attorney General; and the Corps responding
19 back in that letter that the Corps prepared, explaining
20 the hold-harmless clause, is on the Internet. I didn't
21 bring a copy of it. If you just say, "Hold harmless, Army
22 Corps of Engineers," it should pop up.

23 MR. SHAPIRO: Thank you.

24 So moving through a few more slides before we get
25 to Paul's tutorial on insurance issues.

1 --o0o--

2 MR. SHAPIRO: I've been asking you if I could
3 hold off answering the question about the public policy
4 issue, about whether all indemnities are enforceable. And
5 this slide goes to that issue.

6 California Civil Code Section 1668 provides that
7 all contracts which have for their object, directly or
8 indirectly, to exempt anyone from responsibility for his
9 own fraud, or willful injury to the person or property of
10 another, or violation of law, whether willful or
11 negligent, are against the policy of the law.

12 Now, it's awkwardly phrased. And I will
13 acknowledge probably to Ginny that I think when I reread
14 the memo last night, the memo in some ways inartfully
15 addresses this and may even overstate the possible rules
16 that come out of these cases.

17 But I had a chance to go back through it. And I
18 still think the conclusion is right, although the memo may
19 not get there the way it should.

20 The two cases that are cited are not terribly
21 useful. They're two cases that interpret that code
22 section. And they do say that it can be against public
23 policy for one party to try to avoid liability where it is
24 the party that's responsible, which, in essence, is what
25 the rule is.

1 And I do believe the statute stands for the
2 proposition that exculpatory clauses relieving a party
3 from the consequences of its own negligence cannot be
4 enforced where the public interest is involved. And, Lady
5 Bug, this goes back to our dialogue before, where there's
6 a difference in the negotiated power of the parties. If
7 you say this is it, we either don't build the project or
8 we agree. And I think that overlay over the statute does
9 raise a real question as to whether these clauses are
10 enforceable.

11 Now, if they had in the language we just talked
12 about a minute ago that the Corps includes, that the
13 indemnity doesn't apply for the State's own fault, then
14 this section wouldn't apply. What this section is saying
15 is is that where you are at fault and you have an
16 overbroad provision that tries to get the other party to
17 protect you, no matter what, those provisions may be
18 against the policy of the law.

19 And I took a look at whether the liability
20 circumstances we would be dealing with fit within this
21 language. And there is no case law that confirms it. But
22 I do believe that it would apply. I'll read the provision
23 without all the extra words.

24 "All contracts, which have for their object, to
25 exempt the State from responsibility for its own violation

1 of law, whether willful or negligent, are against the
2 policy of the law."

3 And as you know, when there are claims -- when
4 there are lawsuits filed for flood, if it's inverse
5 condemnation, it's a violation of the Constitution, which
6 is a violation of the law. Or it's a violation of another
7 statute, pursuant to the Tort Claims Act, which says
8 there's no general negligence against the State. There
9 needs to be a specific statute which has been violated.

10 And so it seems that any negligence under the
11 Tort Claims Act, which is considered negligence per se,
12 would be a violation of the law; and in the inverse case,
13 would be a violation of the law. And those would apply
14 whether it's willful or negligent conduct.

15 So, I do believe this would apply to the State.
16 But there are no cases, that I can point to, that
17 definitively say it.

18 LEGAL COUNSEL CAHILL: Yeah, what you have here
19 is you have two statutes that aren't totally consistent
20 with each other. You have this statute. You have the
21 Tunkl case, which I think sort of extends this violation
22 of law to almost any negligence when public interest is --
23 although the next case didn't find --

24 MR. SHAPIRO: It narrowed it down.

25 LEGAL COUNSEL CAHILL: -- but it upheld an

1 exculpatory clause of fact.

2 But set against that, we have the Water Code
3 statutes, and I think it's Section 12828 that says,
4 basically, when the State puts up money, it shall get an
5 indemnification. And it doesn't say for its own
6 negligence. That language that's in the Corps of
7 Engineers -- in the federal provision applying to the
8 Corps about except for the negligence of its own
9 contractors isn't in the State Water Code statute.

10 So what you're effectively arguing is the State
11 Water Code statute is a violation of the policy of the
12 Civil Code. And so it's not at all clear how you mesh
13 those. Although what we've done in some agreements is
14 we've said to the extent allowed by State law. Therefore,
15 if it's not allowed by 1668, we're not asking for it. If
16 it is allowed, we'd want it.

17 MR. SHAPIRO: Yeah. And I think "to the extent
18 allowed" is a nuance to a way around it. I don't believe
19 that 1668 is at odds with the Water Code. I think that it
20 could be harmonized. The Water Code says the State shall
21 receive indemnities. 1668 says the scope of the indemnity
22 that can be offered. The indemnity that can be offered is
23 a complete indemnity, except where the State itself is
24 wilfully or negligently liable. So I think you can
25 harmonize the two.

1 But this is what I kept referring to earlier when
2 I say there's a -- it's a question of whether your
3 indemnity is even enforceable. You've got the first issue
4 of, is it arising out of the permit? You've got the
5 second issue, which is, if it's enforceable, is there
6 insurance coverage that applies? Because it doesn't deal
7 with fault based. And then this third issue, which is,
8 does 1668 invalidate the whole provision maybe because it
9 attempts to overreach?

10 Now, I can't tell you whether if 1668 applied,
11 whether it would invalidate the whole provision or it
12 would just invalidate the offensive part. I don't know
13 the answer, and I tried to take a quick look. I don't
14 know if either of you have an opinion on that.

15 SUBCOMMITTEE MEMBER RIE: Okay. Let's take a
16 quick ten-minute break. And we'll reconvene at 2:47.

17 (Thereupon a recess was taken.)

18 SUBCOMMITTEE MEMBER RIE: Okay. Let's continue.

19 MR. SHAPIRO: I just have three more slides
20 before I would propose we talk a little bit about
21 insurance policies, if that's okay.

22 SUBCOMMITTEE MEMBER RIE: Sure.

23 --o0o--

24 MR. SHAPIRO: Moving to slide 17. I did want to
25 just remind the group about AB 70 since we're talking

1 about indemnities, we talked about indemnifying for
2 different things.

3 The Legislature passed AB 70 I guess it's almost
4 two years ago -- two years ago. And AB 70 creates a State
5 policy on when cities and counties would be liable for
6 approving development that results in more damages as a
7 result of a flood case.

8 It's an imperfect statute. It applies to
9 development approved between 2008 and 2012, is my
10 recollection. And it basically provides that if the city
11 or county was unreasonable in approving development during
12 that time, then there is a cause of action for
13 indemnification basically by the State against the city or
14 county.

15 It's my view, and I think your counsel agrees,
16 that this issue takes off the table the Board seeking
17 indemnities from cities or counties on the basis of
18 development, but doesn't speak at all to the issue of
19 whether they might be liable just as members of JPAs.

20 LEGAL COUNSEL CAHILL: Right.

21 --o0o--

22 MR. SHAPIRO: Then to slide 18. You'll also
23 likely recall from the presentation I made before the
24 Board, that in indemnities should consider jurisdictional
25 boundaries. You'll recall that I had offered the Board on

1 behalf of O&M agencies that most would be willing to sign
2 indemnifications with the Board, even where the JPA is the
3 permittee, to indemnify the Board for O&M failures. But
4 that it was important to remember that there are often
5 more than one O&M agency within a JPA.

6 --o0o--

7 MR. SHAPIRO: And so the example is on slide 19,
8 which has the second error of my PowerPoint, in which I
9 show portions of SAFCA. And the left map I've identified
10 in brown, Reclamation District 1000; and the right map,
11 I've identified in purplish blue MA 9, which is a State
12 Maintenance Area and American River Flood Control
13 District. That's not the complete boundary of American
14 River Flood Control District, which also covers north of
15 the American River. And that also fails to include the
16 city of Sacramento, which actually operates and maintains
17 the Sacramento River levee through Old Sacramento down to
18 Sutterville -- down to where MA 9 starts, which is around
19 Sutterville Road.

20 But excusing the liberties I've taken in drawing
21 a crude map, it identifies the geographic distinctions
22 that could be relevant. And if, for example, the Board
23 decided we want someone more than just the JPA to sign up
24 to O&M the levees and indemnify us for O&M failures, and
25 we want the O&M agencies to do so, then it would make

1 sense for the Board to think about whether if SAFCA is the
2 permittee for a Natomas improvement, you would ask
3 American River Flood Control District to provide the
4 indemnity and the commitment, because it doesn't have
5 jurisdiction over Natomas.

6 So that was the sole purpose of these two slides,
7 is to highlight the need to be sensitive to the geographic
8 distinction.

9 The same exists within West Sacramento. Within
10 West Sacramento Area Flood Control Agency, RD 537 and RD
11 900 maintain different levee stretches.

12 Within the Sutter Butte Flood Control Agency,
13 Levee District 9 and Levee District 1 maintain different
14 stretches.

15 I'm going to look to Jim. Within the San Joaquin
16 Area Flood Control Agency is there a similar distinction
17 or is the distinction all the --

18 MR. GIOTTONINI: All are maintained by county
19 flood control.

20 THE REPORTER: Can you identify.

21 MR. GIOTTONINI: Jim Giottonini.

22 MR. SHAPIRO: He said all are maintained by
23 county flood control.

24 THE REPORTER: Thank you.

25 DWR ASSISTANT CHIEF COUNSEL TABOR: But under the

1 provisions we're talking about, about tort liability, if
2 SAFCA -- I hate to pick on SAFCA, because I guess I'm part
3 of SAFCA too -- if SAFCA committed tort in Natomas,
4 American River would be responsible under the provisions
5 we're talking about.

6 MR. SHAPIRO: That's correct, on the tort
7 liability they would be liable as well.

8 The biggest challenge -- or maybe that's a
9 misstatement. An additional challenge for the local
10 agencies is that the Board's current policy as applied to
11 Three Rivers, if it was applied everywhere, asks not only
12 the JPA, but the JPA members to indemnify the Board and
13 the State for what could be improper actions by the State
14 Maintenance Areas. Because in American River -- excuse
15 me -- in SAFCA, for example, MA 9 maintains the levees
16 south of Sutterville. If there's a levee failure
17 resulting from MA 9's actions, if the Three Rivers model
18 was applied to SAFCA, then RD 1000 would potentially have
19 to indemnify the State of California for the State's own
20 negligence in MA 9.

21 Same examples could exist for Sutter Butte; same
22 examples would exist in West Sacramento, where the State
23 is statutorily obligated to maintain the Sacramento bypass
24 levee; as well as -- what's the MA number in West
25 Sacramento --

1 MR. BESSETTE: 4.

2 As well as MA 4.

3 THE REPORTER: Who's that?

4 MR. SHAPIRO: Mike Bessette, B-e-s-s-e-t-t-e.

5 --o0o--

6 MR. SHAPIRO: And with that, we come to Agenda
7 Item 5 on insurance.

8 Are there any questions on that last section that
9 we should go back over?

10 LEGAL COUNSEL CAHILL: I know that Ward is able
11 to make a presentation on the State's interest in the
12 indemnities. I just want to make sure we leave enough
13 time for it.

14 So insurance is going to be how long? Or does it
15 even make sense to do all the indemnity discussion before
16 you get back to insurance?

17 MR. HIGHT: Not more than ten minutes.

18 MR. SHAPIRO: We think probably not more than ten
19 minutes for insurance.

20 DWR ASSISTANT CHIEF COUNSEL TABOR: Mine's about
21 ten. I'm happy to wait.

22 LEGAL COUNSEL CAHILL: Okay.

23 MR. SHAPIRO: So moving to slide number 21.

24 --o0o--

25 MR. SHAPIRO: I put this slide together just as

1 some talking points for Paul to use, just highlighting
2 some information that I'm aware of.

3 SAFCA, as I think we've told you before, has \$35
4 million of coverage this year. RD 1000 has a million of
5 coverage, with three million aggregate. Cost them \$75,000
6 a year. You know, I've raised the policy issue of whether
7 we want money being spent on insurance policies or
8 operation and maintenance.

9 But I'm going to ask Paul to go through a whole
10 bunch of things that he's been thinking about that you'd
11 probably be interested in for him to share.

12 MR. HIGHT: You know, like everybody really loves
13 insurance.

14 Actually when you need it though --

15 SUBCOMMITTEE MEMBER RIE: Could you state your
16 name one more time.

17 MR. HIGHT: Paul Hight, H-i-g-h-t.

18 Actually, Scott asked me to make sure I covered
19 three areas: One dealing with coverage; two,
20 availability; and coverage amounts and costs.

21 I'd like to start with availability, because I
22 think that's important here. Just so you know, my
23 background is on the private sector side working for a
24 variety of insurance companies as an underwriter, prior to
25 coming to the County of Sacramento. But as my broker put

1 it, when I talked to him -- and that's Alliant Insurance
2 Services, and they specialize in public entity business --
3 he said the market for flood exposure is extremely
4 limited. That's exactly what he said, "extremely
5 limited."

6 There are just a handful of sources to obtain
7 insurance: Things like the CSAC Excess Insurance
8 Authority, which is what SAFCA and the County of
9 Sacramento belong to. There is Special Districts Risk
10 Management. And they again would consider insuring a
11 public entity that had a flood exposure to it. Golden
12 State Risk Management is another JPA. These are all JPAs,
13 by the way. They're all formed with the members.

14 And then what they do is they carry a certain
15 level of insurance within their own organization and then
16 they buy excess insurance policies out on the open market,
17 and including using AIG, Lloyds, other worldwide insurers.
18 As far as -- that's about it.

19 SUBCOMMITTEE MEMBER DOHERTY: With so many people
20 required to have insurance, you'd think there'd be a
21 plethora of agencies.

22 MR. HIGHT: Well -- and, again, we're talking
23 about liability and we're talking about -- there is a lot
24 of insurance out there. But not a lot of them are willing
25 to write flood exposures for liability.

1 MR. SHAPIRO: And this is separate from your
2 policy you would have for your home.

3 SUBCOMMITTEE MEMBER DOHERTY: No. But what I'm
4 thinking about is just strictly flood insurance. I have a
5 business. They say I need to have flood insurance.

6 MR. SHAPIRO: But that's first-person property
7 again. That's the example that Teri used or the example
8 that Ginny used of the lightning strike. This is where
9 you're liable to somebody else as opposed to when you're
10 covering your own property from a flood.

11 SUBCOMMITTEE MEMBER DOHERTY: But if I have
12 tenants in medical offices and their equipment is damaged,
13 then I am liable if I didn't carry insurance, I would
14 think.

15 MR. HIGHT: Again, you're still talking about --
16 you're still talking mostly about first-party property.
17 If there was a lease, you may have a liability under the
18 lease, if there was a clause that said you, as the
19 building owner, had to maintain it. But, again, that's a
20 very narrow, limited scope.

21 What I'm really trying to focus on here is public
22 entity. And liability insurance markets are very, very
23 limited.

24 As far as commercial markets out there, my broker
25 said it's possible to approach a few companies like

1 Travelers; AIG, which -- we may want to reconsider that
2 one.

3 (Laughter.)

4 MR. HIGHT: -- Hartford.

5 However, as we pointed out, and as I know from my
6 own experience, most commercial insurance carriers do not
7 want to ensure public entities. And when they know that
8 there's a potential for a flood issue in coverage, they're
9 very likely to back off of that one.

10 So that as far as availability, it's limited.

11 As far as the cost, I'll use SAFCA as an example,
12 since I handle SAFCA's insurance.

13 In 2002-2003 their policy was about \$171,000 for
14 \$10 million of limits. And currently, they're paying
15 about almost \$260,000 and limits now are at 35 million.

16 We have not always been able to get limits higher
17 than \$10 million. Just the past couple of years the
18 market's loosened up a bit to allow us to get higher
19 limits. My broker did point out today, he said he should
20 mention that the market is likely going to tighten up in
21 terms of availability of limits, just because of the
22 capital market issues out there. And prices are expected
23 to go up substantially.

24 We're looking at an estimated premium, at this
25 point, of about \$380,000 for SAFCA for '09-'10, based on

1 the same exposures, which is based on their budgets and
2 their payrolls and their operations.

3 SUBCOMMITTEE MEMBER RIE: Mr. Hight, I have to
4 have you say that one more time. SAFCA only has insurance
5 for --

6 MR. HIGHT: -- 35 million.

7 SUBCOMMITTEE MEMBER RIE: -- 35 million. So
8 after 35 million what happens?

9 MR. HIGHT: What happens? Well --

10 SUBCOMMITTEE MEMBER RIE: And if their liability
11 is upheld.

12 MR. HIGHT: That would be up to the board. They
13 would have to decide how to handle that kind of liability.
14 The same is true for the County of Sacramento. I handle
15 their liability insurance and they carry 25 million. And
16 after that, it would be an obligation of the board of
17 supervisors on how they wanted to handle that liability.

18 SUBCOMMITTEE MEMBER RIE: But the insurance would
19 not cover it?

20 MR. HIGHT: The insurance has a limit on it. And
21 after the limits are paid, there is no more insurance.

22 SUBCOMMITTEE MEMBER RIE: Okay.

23 SUBCOMMITTEE MEMBER DOHERTY: What if you took
24 out two policies?

25 MR. HIGHT: Well, you can take out as many as the

1 market will allow you take out and as many as you can
2 afford.

3 Just this last year, as an alternative to the
4 program that we currently have SAFCA in, I actually
5 approached another broker using another market. The most
6 I could get was \$10 million, because they're aware of the
7 flood potential. And the premium was at least a third
8 higher. And SAFCA -- and I know I'm throwing out a lot of
9 things here -- but SAFCA's current deductible, we'll call
10 it, is a hundred thousand dollars. The best I could do in
11 any other market was \$500,000. They know -- the
12 underwriters know there's potential, and they address it
13 through limitations on the amounts that they'll provide
14 and the premiums.

15 And, frankly, the deal that we have for SAFCA,
16 and we've had for a number of years, I don't consider it
17 to be a bad deal in the marketplace, not at all.

18 SUBCOMMITTEE MEMBER RIE: But the exposure is a
19 billion, isn't it, if there were a flood?

20 MR. SHAPIRO: It's more than a billion.

21 MR. HIGHT: It could be. But the same I think
22 could be said for a serious bodily injury in which
23 somebody is turned into a paraplegic or a quadriplegic.
24 What is the limit? It could be \$25 million if somebody
25 was seriously hurt enough.

1 So it's hard. We have to kind of look at the
2 range of operations that a public entity has and determine
3 what is likely to happen, what's available in the
4 marketplace, what can the entity afford to purchase, how
5 much are they willing to accept on their own? SAFCA is
6 willing to accept a hundred thousand dollar deductible.
7 Five hundred thousand dollars? They weren't that
8 interested in taking out a \$500,000 possible deduction.

9 SUBCOMMITTEE MEMBER HODGKINS: Can I ask a little
10 bit more about the question of when you've exhausted the
11 insurance.

12 You say it's a matter for the board to determine.
13 But can the board determine we're not going to pay any
14 more?

15 MR. HIGHT: Well, I should qualify that and say
16 the board would have to determine based on legal
17 principles and advice of counsel. I'm not in a position
18 to make the decision of what a board would or would not
19 do. Part of it would be that if we're talking about tort
20 liability here, there is no cap on a public entity's
21 liability. How they would go about meeting that liability
22 is something the board would have to determine.

23 If they've exhausted all their insurance limits,
24 then I guess they'd have to look to their assets; or
25 possibly, in the case of joint and several liability, as

1 it's been explained earlier, then there could be the
2 insurance and the assets of the other members of the JPA,
3 under tort liability.

4 MR. SHAPIRO: And, Butch, if I can add to that a
5 little bit.

6 To the extent you're talking about a single
7 purpose agency that doesn't have general fund revenue, but
8 rather achieves revenue through some sort of an
9 assessment, for example, a reclamation district, the law
10 on Proposition 218, which again limits local agencies'
11 abilities to raise money, is reasonably clear that where
12 there's a judgment against the agency, if the agency puts
13 on a Prop 218 vote to try to raise the money to pay the
14 judgment, and the voters vote no against it, then there is
15 no obligation to try to use assessment money that isn't
16 there to pay the judgment.

17 SUBCOMMITTEE MEMBER HODGKINS: Okay.

18 MR. SHAPIRO: And in that case, you would
19 probably -- this is my guess -- you would probably have
20 the defendant public agency and the plaintiff sitting down
21 and saying, "Okay, you have a hundred thousand dollars a
22 year of assessment revenue. Pay us 20,000 a year for the
23 next 500 years, and use the remaining to continue running
24 your operation."

25 It's a little different with cities and counties,

1 because they have sales tax revenue and property tax
2 revenue and those kinds of things. But I've never
3 researched what happens, except to know that generally
4 something is worked out. And maybe the best example was
5 the lawsuit against the City of Sacramento by the disabled
6 regarding the street corners, do you recall? There was a
7 lawsuit claiming that every intersection did not
8 accommodate wheelchair. And the City ultimately said,
9 "We'll agree to spend X million dollars a year for the
10 next ten years to fix this, because we might have a
11 liability if we went and litigated this." And the
12 plaintiff said, "That seems fair, because we're not
13 expecting to shut down 15 fire stations to fix it all in
14 the first year."

15 SUBCOMMITTEE MEMBER HODGKINS: I think that's the
16 point I was trying to get at, is there's a limitation. I
17 mean even -- when you talk about the flood damages that
18 could occur in Sacramento, if you look at the combined
19 budgets of the city and the county - and I've lost track
20 of the county - but in terms of -- I'm going to guess it's
21 not more than \$2 billion. And so you could bankrupt them.
22 I don't know if you'd bankrupt them. They can continue to
23 collect taxes.

24 So the issue we deal with is so potentially huge,
25 as to make it impossible for any government agency to be

1 able to honor another Paterno in some place like the city
2 of Sacramento.

3 MR. SHAPIRO: Yes. And that's why local agencies
4 believe they should receive a pat on the back instead of
5 an indemnity punishment, because local agencies are going
6 out and improving levees, which reduces the chance of
7 liability for all of us. If the local agencies don't do
8 it, we still have the same levees out there that in
9 Paterno we found to have a problem, whether we agree with
10 that decision or not.

11 Finally, to go back to what you were saying -
12 and, Ward, you probably know this better than I - but my
13 recollection is even after the Paterno judgment, it still
14 requires the State Legislature to appropriate the money.
15 And which is not all that different than the circumstance
16 on the local agency. On the local agency, we would need
17 to figure out where the money would come from. The State
18 Legislature elected to pay the judgment and appropriate
19 some money.

20 DWR ASSISTANT CHIEF COUNSEL TABOR: Still paying,
21 as I understand it. So there was a very complicated
22 settlement that ended up happening.

23 SUBCOMMITTEE MEMBER DOHERTY: Paul, what if all
24 the levees in the SAFCA area are built to specification,
25 everything's perfect, the latest engineering, scientific

1 things had all been considered; and all of a sudden you
2 have a downpour and a tornado and lightning and everything
3 up at Verona and the levee breaks? Well, would the courts
4 have to find liability before insurance could kick in?

5 MR. HIGHT: It's very possible that it would have
6 to go that way, just because of the enormity of the event.
7 And I don't know that anybody would want to step up and
8 say, "We'll take the first and see what happens." So I
9 think it would be a very, very messy issue.

10 But if there is no fault -- and I think we've
11 established that insurance policies are fault based.
12 There has to be some fault of the insured in order for the
13 policy to start paying out on a claim. Now, the insurance
14 company will pay for defense to investigate. And so what
15 you would probably have is all the involved entities and
16 their insurance programs would look at defending such
17 claims and then try to decide is there truly fault here.
18 And that would be very, very expensive, because we're
19 talking about bringing in a lot of high paid experts.

20 Some things happen, and they're what we call in
21 the insurance business as Acts of God. There is no fault
22 and there is no coverage. They just happen.

23 And, you know, contracts of insurance are known
24 as contracts of adhesion. Pretty much take the way
25 they're written. And it's not up to the insured to be

1 able to rewrite those, or any other parties. The courts
2 cannot rewrite them. But the insurance policies will
3 reflect what the law says and what the practical
4 implications of the laws are. There's coverage, but it
5 may be limited.

6 MR. SHAPIRO: The law is clear that there is no
7 liability on the part of a public agency for a storm which
8 exceeds the capacity of the project. So that's -- think
9 of that almost as the Act of God exception. Where levees
10 are overtopped, it's an easier discussion, because you
11 only design the levee to handle so much water. There was
12 more water. Plaintiffs may still sue, defense companies
13 may still -- insurance companies may still pay for
14 defense, but there really shouldn't be liability. It's
15 levee failures that cause the problem. Because the courts
16 of late have treated levees as immovable, impenetrable
17 armored structures that can never fail. When, as we know,
18 not only can they, the agricultural levees in our system
19 weren't designed to be a hundred percent. They were
20 designed to handle a certain amount of flow with a
21 reasonable chance of passing that flow.

22 SUBCOMMITTEE MEMBER RIE: Did you want to say
23 anything else with regard to obtaining insurance for third
24 party acts of negligence or omissions?

25 MR. HIGHT: I think what Scott said earlier about

1 the additional insured issue is also very important.
2 Because if a party is looking to gain protection under an
3 insurance policy, there has to be some fault of the
4 insured party in the first place. So what we want to be
5 careful about here is that the indemnity language runs
6 along what we proposed up here, which I believe clearly
7 trigger insurance coverage protection. And the party
8 being named as additional insured would have a much better
9 chance of getting the protection on that policy, in
10 addition to the indemnity, because, again, there would be
11 a basis for liability.

12 So additional insured status and indemnity
13 provisions really go hand in hand. And when we write
14 those up, we look to both. And the rule here is never
15 write your indemnity provision broader than you can gain
16 insurance to a likely loss situation. If you keep those
17 in balance, you're more likely to have protection that
18 everybody is looking for.

19 SUBCOMMITTEE MEMBER RIE: Okay. Did you want to
20 add anything else with regard to Proposition 218 or
21 insurance companies not willing to write policies?

22 MR. SHAPIRO: The 218 was merely my comment to
23 Butch a minute ago, about where a judgment comes down
24 against a reclamation district and you still need a 218
25 vote.

1 I don't know if any of our other local agencies
2 that are here have anything they want to offer. I know
3 Steve's been looking at more insurance recently for 784.
4 I think Paul has made some inquiries --

5 MR. DEVEREUX: Paul Devereux, Reclamation
6 District 1000. We're putting inquiries out to see what's
7 available, what we could even purchase, and what the cost
8 would be.

9 SUBCOMMITTEE MEMBER HODGKINS: Are you pursuing
10 along whether there's any way for American River, RD 1000,
11 and SAFCA to get covered by the same policy? And would
12 that coverage be less costly than the combination of
13 whatever the three of you are paying?

14 MR. DEVEREUX: We haven't done that to date,
15 Butch.

16 SUBCOMMITTEE MEMBER HODGKINS: I just wonder if
17 it's worth pursuing, especially when you consider the
18 County of Sacramento is in that JPA too.

19 MR. DEVEREUX: Well, one point I'd make, is like
20 Paul had mentioned, is all of -- or most of these
21 insurance policies are written through some sort of a
22 consortium-type thing anyway. It's not like we're going
23 out with an individual company. It's more through a
24 consortium. And you might be better served if there were
25 different consortiums that were offering the coverage

1 versus all of us going to one location.

2 MR. HIGHT: And there are consortiums. As I'd
3 mentioned, there's the Excess Insurance Authority, there's
4 Special Districts Risk Management, Golden State Risk
5 Management. All of these are JPAs in and of themselves
6 composed of members. They pay their insurance premiums
7 and they utilize those premiums to go out and buy
8 insurance. And also they retain some of that loss within
9 their own ranks. And by doing so, they're able to get a
10 better deal than going out to just an insurance company.

11 MR. SHAPIRO: Another JPA that doesn't write any
12 new flood policies is ACWA, a JPIA, who's the Association
13 of California Water Association Joint Powers Insurance
14 Agency. And American River still has a policy through
15 them.

16 MR. KERR: We were able to get in before they
17 realized how much liability we were bringing into their
18 pool.

19 SUBCOMMITTEE MEMBER RIE: State your name.

20 MR. KERR: Tim Kerr, American River Flood Control
21 District.

22 SUBCOMMITTEE MEMBER RIE: Thank you.

23 MR. SHAPIRO: And I understand Paul that RD 1000
24 looked to ACWA JPIA and --

25 MR. DEVEREUX: Right. Because we tried to get in

1 and we were turned down.

2 MR. SHAPIRO: And I just wanted to offer briefly
3 on Three Rivers. And I think Steve Fordice from 784 has
4 something to offer.

5 Three Rivers insurance is through CSAC, the
6 California State Association of Counties, via Yuba County.
7 And I believe, though I'm not positive, that the flood
8 policy that Three Rivers has is synonymous with Yuba
9 County's flood policy, meaning that there's -- the same
10 limit applies to both. There's no -- there isn't
11 duplicative coverage. They aren't each covered, let's
12 say, for 5 million, because Three Rivers couldn't get a
13 policy other than to rely on the county's policy.

14 And then, Steve, your point that you had.

15 MR. FORDICE: I'm Steve Fordice, General Manager
16 of 784, the keeper of the famous lawn mower.

17 (Laughter.)

18 MR. FORDICE: This year we paid \$77,544 for a \$1
19 million coverage per incident, with a \$3 million yearly
20 cap. This is through the Special District Insurance.

21 I did check if we could get an additional
22 million. We could for an additional 9,200. We're already
23 paying almost 12 percent of our budget just for a
24 liability insurance, which is primarily focused on legal
25 defense.

1 Previously the -- a couple years ago we were
2 paying 80,000. But since there hasn't been a flood event
3 for quite a bit, they help reduce some of our costs.

4 It is very difficult to find insurance, as has
5 been pointed out. And while we could purchase some more,
6 I don't think we're going to because of the cost. If
7 worst comes to worst, we could provide you with \$1 million
8 of indemnification, which would be about two minutes of a
9 flood.

10 If worst comes to worst and we were liquidated,
11 you could probably get about \$500,000 worth of assets from
12 the organization, depending on land value. And I didn't
13 count the number of shovels, but I could come back next
14 meeting --

15 SUBCOMMITTEE MEMBER DOHERTY: That was 77,000 for
16 how many million? Just one million?

17 MR. FORDICE: One million per event and \$3
18 million for a yearly cap.

19 MR. SHAPIRO: Did you say 12 percent of your
20 budget?

21 MR. FORDICE: Yes, sir. It was very close to 12
22 percent. So I'd love to include only three percent,
23 but --

24 MR. SHAPIRO: You know, and this raises that one
25 more issue that's on the table. Some of you may have

1 heard of the term of a "wasting policy." But a wasting
2 policy is basically where the coverage amounts go to the
3 defense as well as the liability. And so as you're
4 relying on the insurance company to defend the claim, they
5 start eating away at the insurance amount to pay for the
6 defense. And you can, as you know, in flood cases spend a
7 lot of money defending them, potentially leaving not much
8 money at the end to pay a claim, which is, in part,
9 Steve's comment about we rely on it for defense. That's
10 what that policy would be for.

11 MR. HIGHT: It's also known as defense costs
12 within limits. And the SAFCA policy, the County policy,
13 all the public entity policies that I'm aware of are set
14 up that way. So if you have 25 million, the 25 million is
15 for everything.

16 MR. FORDICE: If I could add one more thing, that
17 the policy could become a greater percentage of our
18 income, particularly given the economic situation where
19 people are not paying their assessments. And so as the
20 overall income drops, the percentage decreases. And that
21 could be happening with us this year.

22 MR. SHAPIRO: On the issue of insurance, Ron or
23 Steve or Jim or Mike, do you have anything you want to add
24 on this topic.

25 MR. GIOTTONINI: There were a lot of chairs in

1 here.

2 Jim Giottonini.

3 MR. ERICKSON: I'm Ron Erickson with Sutter
4 County. I don't see any way we could possibly insure
5 against a flood. It just can't happen.

6 MR. WINKLER: Steve Winkler, San Joaquin County.

7 I know that we've varied between CSAC Excess
8 Insurance as an umbrella policy. The county is a
9 self-insured entity for up to certain limits, and we have
10 million dollar deductibles on our own internal coverage
11 before we'd even kick in an excess insurance policy. So
12 there's a lot of liability. And you do those things just
13 to keep the coverage affordable and to be able to get
14 coverage. If you aren't willing to at least eat the first
15 million dollars as a county, you're not likely to find
16 much out there in the way of coverage in this litigious
17 society that we're in.

18 EXECUTIVE OFFICER PUNIA: I just want to make a
19 comment. I think I'm learning new stuff too regarding
20 insurance.

21 The O&M-type agency, RD 1000 or 784, they are
22 buying insurance, so that they don't do anything wrong in
23 operation and maintenance of the project. So they're
24 liable for an O&M component.

25 Whereas JPAs, now they're becoming the designer

1 and builder of the project, like SAFCA. So their
2 insurance says that they don't do anything wrong when
3 designing and building or modifying the project.

4 So I think there are two different components of
5 insurance needed from JPA and from the O&M-type agencies.

6 MR. SHAPIRO: Well, my understanding is that the
7 policies are essentially the same policy but speaking to
8 doing something wrong. And then, as you say, for 784, for
9 example, was doing something wrong in the operation and
10 maintenance, where SAFCA is doing something wrong in the
11 construction or design.

12 But the policy that the Board has applied to
13 Three Rivers to date doesn't make that distinction. It
14 simply says the State will be indemnified by Three Rivers
15 and 784 and the county, whether they are responsible or at
16 fault or not, for anything that happens and any cost that
17 the State may have. And I think we've talked today about
18 a number of the concerns we have about that language, and
19 there may be ways of ratcheting it back to being more
20 reasonable, to align it with insurance coverage. But
21 you're right, there are different roles that we all play
22 in this. And our hope, as local agencies, is that
23 whatever policy's adopted will reflect our roles and not
24 intermix our roles and our geographic boundaries and those
25 kinds of issues.

1 SUBCOMMITTEE MEMBER RIE: Okay. Let's move on
2 and give Mr. Tabor an opportunity to make his
3 presentation.

4 DWR ASSISTANT CHIEF COUNSEL TABOR: Well, thank
5 you, members of the Board, and thank you, Scott, for your
6 presentation. I think you did a very thorough job. And I
7 think it's all helpful to all kind of come to a similar
8 level of understanding as to the principles that we're
9 talking about.

10 But I would just like to spend a few minutes
11 talking about what are some of the Water Code provisions
12 that requires the Board to insist upon indemnities from
13 local agencies.

14 And I want to start -- first one I want to
15 mention is Water Code Section 8370. This is an old
16 provision. It's been around since 1943. And 8370 says
17 that, "It's the responsibility, liability, and duty of
18 reclamation districts, levee districts, protection
19 districts, drainage districts, municipalities, and other
20 public agencies within the Sacramento River Flood Control
21 Project to maintain and operate the works within those
22 agencies."

23 So while the focus is on operation and
24 maintenance, the Legislature used the word
25 "responsibility, liability, and duty." And so it didn't

1 seem to be talking about anybody who has a contract with
2 the Board or a permit from the Board. It says that for
3 the Sacramento River Flood Control Project, the local
4 agencies that are getting benefited are responsible.
5 They're liable for that project.

6 Now, obviously we can talk about, you know, what
7 that means and how it's enforced. That's perhaps for
8 another day.

9 Another provision that applies to most of the
10 Board's projects is 12642. 12642 is part of the Water
11 Resources Act of 1945. Virtually all of the Board's own
12 projects were authorized under the Water Resources Act of
13 1945. And this particular provision talks about the
14 responsibility and duty of counties, cities, state
15 agencies, public districts affected to maintain and
16 operate the flood control and other works, and to hold and
17 save the State and the United States free from damages.

18 This is another provision. It's been around
19 since 1953, though it's in the Water Resources Law of
20 1945. If you can understand that, then you're a lawyer.

21 12643, which is the section following the one I
22 just talked about, is a relatively new provision. It was
23 added by AB 1147, which you've heard about over the last
24 several years, which changed the cost-sharing relationship
25 of the non-federal interests for these federally

1 authorized projects.

2 And this section specifically requires an
3 agreement between either the Board or the Department and
4 the local agency, whereby the local agency is agreeing to
5 indemnify and hold the State officers, agents and
6 employees harmless for any and all liability for damages.
7 So it was very broad.

8 Now, why would they add it in 19 -- as part of AB
9 1147? As to the Board projects, here we already have some
10 pretty good language already on indemnities. But this was
11 written to cover the rest of the State of California that
12 operates under the same cost-sharing formulas that the
13 Board projects do, where there was no historic requirement
14 for any kind of an indemnity agreement between the State
15 and those agencies.

16 So it not only brought all those other projects
17 in, but it also relates to the Board projects as well.

18 Next section, which is a little bit anomalous, is
19 12828, because 12828 is actually in the Water Resources
20 Law of 19 -- or the Flood Control Law of 1946, which most
21 of the Board projects don't fall under. However, the
22 Legislature, in its creative wisdom, applies 12828 to
23 Board projects. And what 12828 says is that a public
24 agency other than the Board has to either assume
25 obligations directly with the United States to hold them

1 harmless for the construction of the works or has a
2 binding agreement with the Board to hold the State and the
3 Board harmless from those kind of claims.

4 So even though the local district obviously is
5 not the one constructing the projects in the typical
6 sense, 12828 requires these local agencies to hold the
7 State harmless from the construction of these projects.

8 Overreaching? Whether it's overreaching or not,
9 this is the way we read the Water Code.

10 The Board's own specific statute as to the
11 Sacramento River Bank Protection Project, which is in
12 8617.1 of the Board statutes, ties back in this 12828
13 provision from the Flood Control Law of 1946 to Sac Bank.
14 And it talks about having an agreement relative to the
15 indemnities and the operation and maintenance, as well as
16 putting an affirmative obligation on the Board to
17 investigate and to report to the Governor methods of
18 feasible recovery from the beneficiaries of the Sac Bank
19 work for the other non-federal contributions in excess of
20 the lands, easements, or rights of way in liabilities that
21 may be incurred due to the construction, operation and
22 maintenance of the project.

23 Now, obviously that's not a specific obligation.
24 But what it tells me is it -- it says the Legislature
25 wants you, the Board, to investigate and look for every

1 way to make the beneficiaries of the project financially
2 responsible.

3 Those are really the key provisions I wanted to
4 mention. I did do some compilation of some of the federal
5 provisions, and we talked about Section 103 of WRDA of
6 1986. And one other provision that the Board may be
7 familiar with is in the Board's PL 84-99 rehabilitation
8 agreements entered into the Corps, the Corps also brings
9 in that obligation to have an O&M agreement and an
10 indemnity agreement, not only with the State, that the
11 State then translates on to our local agency partners.

12 So I'll take a little bit different tack than the
13 other presentations. But I just kind of wanted to
14 share -- so this doesn't mean DWR is trying to be
15 overbearing. What we're trying to do is to implement what
16 we read the Legislature's direction to us is, whether it's
17 to the Department or to the Board in our assistance and
18 aid to the Board in carrying out its projects.

19 But, you know, I think this has been a great
20 discussion. I think getting the insurance coverage is
21 probably something that we haven't put enough thought into
22 in the past. We were trying to focus on the coverage of
23 the indemnity. And I'm certainly willing to work with the
24 Board's counsel, as well as the local agencies, to craft
25 these clauses in a more careful way, so that we make sure

1 we can get access to any insurance policies out there.

2 And obviously nobody wants a Paterno. And all of
3 us hope that a Paterno kind of a thing doesn't happen
4 again. I'm not talking about the end result. I'm talking
5 about what happened in '86 when the levee broke, from
6 circumstances that, at that point, I think were beyond any
7 of our -- anybody's expectation as happening. You know,
8 in those kind of events, we have to -- we all have to be
9 very creative in trying to find solutions. And obviously
10 there's no way that anybody can anticipate that a local
11 agency, such as RD 784, can take over billions of dollars
12 in debt. And Natomas as an example and the rest of
13 Sacramento, Stockton, all these areas where you have a lot
14 of damageable property that could be affected by a flood,
15 it's a huge loss. But if you look outside of the valley,
16 the State has virtually -- DWR anyway, and the State
17 generally, has virtually no liability for floods.
18 CalTrans has some because they muck around everywhere.

19 But within the valley, beginning in 1911, the
20 State decided it had an interest in controlling the floods
21 or managing the floods within the Central Valley. And I
22 think these code provisions that I referred to today says,
23 yeah, we, the State, we're willing to do this flood
24 control for the Central Valley. There's a benefit for the
25 State. But really there's a benefit for the individual

1 constituencies, the counties, the cities, all the other
2 districts that are benefiting from this project as well,
3 and that we're all in this together.

4 And going back to the cases leading up to
5 Paterno, Belair, Bunch, and others, the whole idea is we
6 want to encourage the government, whether it's the State
7 government, whether it's local government, to do flood
8 control projects, because there's a positive interest in
9 encouraging flood control works.

10 If we were all -- if we all operated under the
11 fear of liability, we wouldn't have any flood control
12 projects, we wouldn't have any freeways. We'd be living
13 in a very anarchical society where nothing -- not much
14 good was going to be happening.

15 So we've got to find ways to work together, try
16 to limit each individual's liability, to the extent we
17 can, while making progress and providing for the future.

18 I'm sorry. I got a little bit soap box-ish.

19 SUBCOMMITTEE MEMBER RIE: That was good.

20 Okay. Were there any other items on the agenda
21 before we go to next steps?

22 MR. SHAPIRO: Number 8, which would be sharing
23 the local agency interests.

24 SUBCOMMITTEE MEMBER RIE: Okay.

25 MR. SHAPIRO: So it's remarkable it was not

1 everything I talked about till now. I've tried to present
2 everything in a truly unbiased way. Now, we come to the
3 biased part, where if Ward shared the State's interest, we
4 would offer the local agency's perspective.

5 SUBCOMMITTEE MEMBER RIE: And you're going to do
6 that?

7 MR. SHAPIRO: And I was going to do that. It's
8 pretty brief.

9 SUBCOMMITTEE MEMBER RIE: Okay.

10 MR. SHAPIRO: I do want to just offer a comment
11 or two on some of the code sections that Ward offered. I
12 absolutely agree that those sections give a flavor, I
13 would say, of the State Legislature saying, "We, the
14 State, want to help. We don't want to be the ones holding
15 the bag if there's a problem."

16 I think that they inform the philosophy of the
17 State. I don't think any of them are -- any of them
18 require this Board to act in any particular way.

19 I will note that Section 8370 deals only with the
20 Sacramento River Flood Control Project. It does not apply
21 down in San Joaquin, for example.

22 That these -- most of these provisions or at
23 least Section 1282 -- excuse me -- 12828, 12643, and 8617,
24 they all deal with circumstances, near as I can tell,
25 where the federal government is saying, "We're going to

1 come in and build a project. And so, State, we need you
2 to sign our PPA, our Project Partnership Agreement." And
3 then the State is saying to the Board, "Go ahead and sign
4 these, but make sure before you sign them for the Corps to
5 do the work, that the locals are providing protection to
6 the State."

7 Those, of course, aren't what we're talking about
8 here. Here, we're talking about encroachment permits for
9 the local agencies. Now, I don't want to go too far with
10 that, because I do agree with Ward, these show a flavor of
11 the State's interests. I just want to stress it to you
12 that I don't think any of them are controlling. They're
13 instructive, would be how I would put it.

14 --o0o--

15 MR. SHAPIRO: In terms of the specific interests,
16 it's very clear that my members aren't interested in
17 reducing liability for all by reducing the risk of
18 flooding. In actuality, the sentence probably should be
19 flipped around the other way. These agencies aren't in
20 the reducing liability business. They're in the reducing
21 flooding business. And in doing so, the added benefit is
22 hopefully to reduce liability for everybody.

23 Cities and counties don't want to take on
24 liability for a system that they didn't build, agree to
25 maintain or design. It's just by happenstance that the

1 JPAs are the entities that are coming before you; instead
2 of in some circumstances, for example, Wheatland, where
3 Reclamation District 2103 is coming before the Board and
4 getting a permit, and the City of Wheatland's not involved
5 at all. Under these circumstances, their JPA is coming
6 before you. But the cities and counties aren't on the
7 hook for the levees. AB 70, if it's a legitimate statute,
8 probably addresses their liability for development.

9 And so they're thinking, "Why are we being
10 punished and asked to sign up for liability that we are
11 only getting because we're trying to help and make things
12 better?"

13 They agree if they're acting unreasonably, that
14 they should be on the hook. I have yet to have a single
15 city or county say, "We should have complete immunity."
16 What they're saying is, "If we act unreasonable, we should
17 have liability."

18 And for O&M agencies, they're quite willing to
19 accept liability for their failure to properly maintain
20 work they do. They don't want to be responsible for each
21 other.

22 --oOo--

23 MR. SHAPIRO: And the last slide I'll offer is
24 just some thoughts of what could happen with an overbroad
25 indemnity. I think that the Three Rivers circumstance was

1 a perfect storm. You know, it's 2005 development is going
2 gangbusters. Yuba County sees a way in the future of
3 having a really wonderful county. They need development
4 to make it happen, and they are willing to sign up to just
5 about anything, and they agree to sign what the Board
6 presented.

7 I don't see that happening with all the other
8 JPAs. And I think if the Board's indemnity ends up being
9 overbroad, that you may see regional flood management kind
10 of going by the wayside, JPAs dissolving, cities or
11 counties pulling out of JPAs and saying, "O&M agencies,
12 you form the JPA and go forward and do things."

13 We might have JPAs just doing funding, but not
14 doing planning and construction. Or the worst-case
15 scenario is the JPAs just pull out altogether and say,
16 "State, let's wait for federal projects to solve this."
17 And then we all have liability for a long time.

18 And there is varying views of this issue. You
19 know, there are some cities and counties that I've talked
20 to that have said, "If the Three Rivers rule is applying,
21 then I'm going to veto every project that my JPA might
22 bring to the Board. I'm not going to let it be built."
23 There are others that say, "Gosh, under the law now we
24 have some liability. As long as the liability lines up
25 with our insurance, we'll do our best to make it work."

1 So hopefully the Board can come up with some
2 reasonable position here that can work for JPAs and we can
3 keep building projects.

4 So those are the interests of the local agencies.

5 SUBCOMMITTEE MEMBER RIE: Okay. Questions,
6 comments?

7 MR. ERICKSON: Ron Erickson from Sutter County.
8 I can't speak, of course, for the Sutter Board. But
9 bullet number two up there about cities and counties
10 withdrawing from JPAs, I think is a likelihood, because
11 the Board is going to be faced with a choice. We can't
12 insure against catastrophic flood. So are we going to
13 mortgage the county perhaps in perpetuity to continue
14 participating in the JPA?

15 That's the decision we'll have to make.

16 MR. KERR: I can think of another scenario --

17 SUBCOMMITTEE MEMBER RIE: Will you state your
18 name.

19 MR. KERR: Tim Kerr, American River Flood
20 Control. -- is let's say SAFCA is planning a project in
21 Natomas that purely benefits Natomas. But if the Flood
22 Board asked for indemnity from all the member agencies, it
23 might be hard to convince the Board to give that
24 indemnity, because they're not receiving any benefit from
25 that permit. And I would hope that they would understand

1 the benefit they're getting from SAFCA. But I can see
2 that being a little bit of an uphill struggle.

3 SUBCOMMITTEE MEMBER RIE: Any other comments?

4 MR. GIOTTONINI: Yes, I'm Jim Giottonini
5 representing SJAFCA.

6 If you can turn back the clock on Paterno, it
7 would have this policy in effect years ago. What outcome
8 would be different in the Paterno lawsuit from the State's
9 point of view?

10 SUBCOMMITTEE MEMBER RIE: Do you want to tackle
11 that, Ms. Cahill or Mr. Tabor?

12 LEGAL COUNSEL CAHILL: I don't know.

13 MR. GIOTTONINI: Wouldn't the end result still be
14 the same? Would it be the whole half a billion dollars?

15 DWR ASSISTANT CHIEF COUNSEL TABOR: I don't know
16 the answer. We know Paterno, nobody was able to come up
17 with any kind of an indemnity agreement between the Board
18 and RD 784. The State had the statutory provisions to
19 rely upon. I wasn't directly involved in most of that
20 case, so I don't know how it would be different. But I
21 certainly think having an agreement is better than not
22 having an agreement.

23 MR. GIOTTONINI: Depends on the agreement.

24 MR. SHAPIRO: And Ward's speaking about Water
25 Code Section 8370, which he quoted before as saying it's

1 the liability and duty of local agencies within the
2 Sacramento River Flood Control Project. And my
3 understanding is that the Attorney General considered
4 suing RD 784 after Paterno under that statute and
5 ultimately decided not to. You might imagine it's because
6 there was not going to be any money that 784 had anyway,
7 so why take a chance on a bad precedent and having a judge
8 say it's unenforceable.

9 SUBCOMMITTEE MEMBER DOHERTY: Just as coming in
10 off the street and coming to the Board and knowing the
11 history of Sutter County and of flooding, there's no way I
12 would have voted to agree if there had not been a JPA.
13 Because here were these developers out there going full
14 tilt. And it was a floodplain. So, I just felt it was
15 better insurance for us and for the State to have the JPA
16 at that time.

17 SUBCOMMITTEE MEMBER RIE: Mr. Hodgkins.

18 SUBCOMMITTEE MEMBER HODGKINS: Just a comment.

19 You know, we're phrasing it in here in terms of
20 the State versus the city and counties and the special
21 districts. And I think the real intent was the State was
22 willing to help, because it has broader powers and the
23 ability to treat the system more as a system than
24 individual government did, and it was willing to step in
25 and help, provided that the people who benefited from the

1 property, which are not the cities, not the counties, but
2 the individuals who live here, didn't -- the State didn't
3 incur liability as a result of helping those folks.

4 And then we lost track of making sure -- I mean,
5 I will go so far as to say, even in 1945, most people had
6 some understanding of the risk of living in various parts
7 of the valley. And then we had the boom and all of the
8 things that have happened since then, which includes
9 Proposition 13 and local governments losing sources of
10 revenue that have gone over to the State, that create an
11 environment where we all - all - don't work hard at making
12 sure people who benefit from these projects understand
13 that they benefit from these projects and there are risks
14 associated with this.

15 Now, that's the end of the comment. It doesn't
16 help us much in figuring out what we do, except that, you
17 know, I think we -- we have to figure out from the Board's
18 standpoint what we should be doing here. If that
19 provision that says we should do everything to ensure the
20 State from liability really means that, we should be
21 making all of the parties to the JPA sign off on these
22 agreements. Because whether they're insured or not, I
23 think the City and the County of Sacramento would be
24 liable for the judgment, whether their insurance pays it
25 or not. And they have some resources that would pay the

1 judgments.

2 Now, the bigger question is, does it make any
3 sense to do something that could potentially bankrupt the
4 City and County of Sacramento to avoid the liability
5 coming to the State? And I don't think it particularly
6 does. Philosophically, my position is everybody ought to
7 be liable for their mistakes. And so dividing this
8 liability up along the lines of it's in proportion -- if
9 our employees caused the problem, the State should be
10 liable. If it's the JPA or the members to the JPA, they
11 should be liable. Sounds like one of the things that I
12 thought, which is that the Corps is not liable if they
13 make a mistake, isn't true. The '88 WRDA sounds like they
14 are responsible if they make a mistake.

15 DWR ASSISTANT CHIEF COUNSEL TABOR: Except for
16 the tort demeanor that they have.

17 MR. SHAPIRO: It's not that they're not liable.
18 It's that they're not asking you to cover them for that.

19 SUBCOMMITTEE MEMBER HODGKINS: Okay.

20 MR. SHAPIRO: Because no one can sue them in the
21 first place for it.

22 SUBCOMMITTEE MEMBER HODGKINS: Okay, okay.

23 LEGAL COUNSEL CAHILL: You know, is there an
24 area -- is there an area between that isn't covered, it's
25 not either the State's negligence or the local district's

1 negligence -- is there a third possibility? Or I guess
2 that's what the Corps is, the third possibility. But is
3 there a fourth? I mean, you know, it's one thing for us
4 to say, "You have to indemnify us, unless we're at fault."
5 And the key is, well, they'll always be insurable. Or are
6 there some cases where we're not at fault, but neither is
7 the local and therefore they don't have any insurance?

8 DWR ASSISTANT CHIEF COUNSEL TABOR: In the
9 Paterno case in the trial court, the jury found that the
10 State was not negligent. The State did nothing wrong.
11 But yet the Court of Appeals, under the theory of inverse
12 condemnation, the Court found a way to say, "Well, the
13 State should have known that there was a crappy foundation
14 under that levee and the State should have gone in and
15 made a better levee system."

16 So what did we do wrong? Did we get into the
17 flood control business, was that our mistake? Or was it
18 that we started with what the farmers in 784 did and
19 thought we were making it better?

20 SUBCOMMITTEE MEMBER HODGKINS: But, in effect,
21 that court, wasn't it also trying to say all of the
22 beneficiaries of the system benefited from the fact that
23 these people flooded and -- you know, they may not have
24 said it specifically. But you've got to think that the
25 judge was thinking the way to get to all of the

1 beneficiaries of the system is to make the State pay.

2 DWR ASSISTANT CHIEF COUNSEL TABOR: How do the
3 people of L.A. benefit?

4 SUBCOMMITTEE MEMBER HODGKINS: We couldn't --

5 SUBCOMMITTEE MEMBER RIE: Why don't we let Mr.
6 Devereux have a turn.

7 MR. DEVEREUX: Just a quick, kind of follow-on to
8 what Butch is talking about. Responsibility and taking on
9 the technology and the risk is one thing I've been an
10 advocate of. And I know Butch was -- at SAFCA was people
11 would carry flood insurance. If you live in the valley,
12 you live behind a levee, you ought to be required to pay
13 flood insurance. It then bears some responsibility to the
14 person that has a cost of living behind this levee in the
15 valley. It at least provides a pool of money that you can
16 recover for your losses. Obviously, it doesn't cover, you
17 know, the catastrophic and the emotional distress, but at
18 least provides a pool of money. And as we've heard from
19 the insurance, it's not a fault-based one. So it's not
20 having to find somebody who's at fault to get that money.
21 You get the money to rebuild your house and your life.

22 I think we ought to be at least pushing in that
23 direction. I don't know if the Board has any means of
24 trying to get local agencies and/or the State of
25 California to step up and then try to take a stronger

1 policy position on requiring flood insurance behind
2 levees.

3 SUBCOMMITTEE MEMBER HODGKINS: Well, we might try
4 and do that. But let's chat. I mean at least develop
5 what our next steps might be. I mean, I tend -- I want to
6 go back and see what I heard.

7 If we modify our indemnity provisions to reflect
8 the suggestion that you put up here, would the JPA's
9 parent agencies still have the same objection to being
10 asked to sign off on the JPA, on the permit and the other
11 agreements?

12 MR. SHAPIRO: I don't know the answer. And I
13 don't think anyone here can give you an official answer,
14 because it's ultimately the board of supervisors or the
15 city council that's going to decide.

16 SUBCOMMITTEE MEMBER HODGKINS: I understand.

17 MR. SHAPIRO: But, you know, Ron Erickson from
18 Sutter County or Paul from Sacramento County, do you see
19 that if the changes are made, this is the kind of thing
20 that they would be open to considering? Or do you think
21 that any requirements of indemnity by the member agencies
22 will be rejected out of hand? Or maybe you can't answer
23 at all.

24 MR. ERICKSON: I can't answer.

25 MR. HIGHT: All I can answer is, when I see the

1 indemnity requirement that's up there now, I consider it
2 to be unreasonable and uninsurable. And for somebody in
3 risk management to go to their board and make a
4 recommendation, I can't recommend that. I'd recommend
5 against it. Might be able to recommend something more
6 favorable, but it would have to be more favorable to the
7 county managing its risks with its insurance program, and
8 we'd have to see. But it's a policy decision. It's not a
9 pure economic or there's coverage, there isn't coverage.
10 It's a policy decision. But I know what I wouldn't want
11 to recommend. I'd feel better about an improved indemnity
12 agreement from our perspective.

13 LEGAL COUNSEL CAHILL: Let me pull up on a couple
14 of things too. You know, we don't want to lose sight of
15 the fact that Scott has said already the O&M agencies have
16 said they would be willing to sign on and indemnify at
17 least for their own O&M activities. So that's a part of
18 the whole.

19 And the other thing was I think eventually we
20 want to follow up on these provisions in the agreements of
21 the JPAs where they don't dissolve as long as the JPA has
22 that. Because I think you do still have a problem with
23 JPAs potentially dissolving and leaving no one to pick up
24 that obligation that State law wants someone to be
25 carrying.

1 And so it could be in terms of the parent
2 agencies saying, "We'll sign on to say that if the JPA is
3 ever dissolved, then we'll be on the hook." So they're
4 not on the hook as long as the JPA exists, but if it
5 dissolved, they would be.

6 Or this idea that the joint powers agreement
7 might be amended, so that they can't dissolve as long as
8 at least the JPA has the obligation, because one danger is
9 eventually we won't even have the JPA. You will have no
10 one. I mean part of the reason to try to get the member
11 agencies on was a fear that the JPA would go away and
12 there would be nobody. And I think that's still a valid
13 concern. I think really looking at the indemnity
14 agreement is something that we should be doing.

15 But I also think we need to maybe be looking at
16 the JPA agreements. Because actually I had looked at it
17 and I hadn't noticed the provisions that Scott mentioned.
18 I was looking for something that talked about what
19 happened to liabilities on dissolution, and I didn't see
20 those words. I saw a provision -- in every one there was
21 a provision for how you split up remaining funds, you
22 know, if there was stuff left over, how you'd split it.
23 But when it came to liabilities left over, I didn't see
24 anything. But I obviously didn't appreciate those two
25 provisions that he has pointed out.

1 So, I mean, I think there's definitely stuff for
2 us to be working on. And this has been very helpful.

3 SUBCOMMITTEE MEMBER RIE: Okay. We're almost out
4 of time. And you can comment and then we'll let you
5 comment, and then we'll go to next steps.

6 MR. WINKLER: Well, I'm an engineer by training
7 and I'm -- Steve Winkler, San Joaquin County -- engineer
8 by training and a manager by profession. So I don't claim
9 to be an attorney or a great eloquent speaker on issues of
10 liability. But I think a question that we need to reflect
11 on, as a policy board is, are we better off with the JPAs
12 or without the JPAs? We're worried about, well, what if
13 they go away? Well, what if they won't play at all? Are
14 these reclamation districts, these smaller stand-alone
15 districts going to take on these huge projects? Are they
16 going to be able to fund them without the backing of the
17 cities and the counties? And are we going to be left with
18 the fact that nobody's willing to improve these levees,
19 let's just wait for the next catastrophe to happen and
20 then see where the liability falls?

21 You know, it was said well by several parties
22 earlier, that you don't get in this game without
23 liability. So what we're trying to do is improve the
24 situation in the hopes that we'll avoid the catastrophe
25 that brings the liability with it. So are we better off

1 taking affirmative actions to correct levee deficiencies
2 or improve levees, or does that, in itself, create more
3 liability? We're raising levees, creating a bigger
4 catastrophe if they fail. But are we better doing
5 nothing? And the real threat is that cities and counties
6 may say, you know, "We're not going to put our jails and
7 our human services agencies and our fire protection and
8 our police forces at risk due to flood liability if that's
9 going to be the requirement."

10 LEGAL COUNSEL CAHILL: Well, eventually when they
11 build, there's going to be a kicking in time when cities
12 and counties will be liable if they approve development
13 unreasonably. And if they do nothing and leave these
14 horrible levees that they know are insufficient, they will
15 be liable if they approve unreasonable -- development
16 unreasonably behind inadequate levees. So eventually
17 there will be pressure on the cities and counties to play
18 ball. But there is -- you know, as always, we're always
19 worried about that interim period.

20 SUBCOMMITTEE MEMBER RIE: Okay. We're almost out
21 of time. And I'll let you speak in a second.

22 It sounds like you all want to meet again,
23 because there's several unanswered questions. Some of the
24 questions are perhaps modifying JPAs. Mr. Winkler brought
25 up, you know, what are the benefits of JPAs versus

1 dissolving JPAs. Ms. Cahill brought up government
2 immunity. Then we need to talk about perhaps improving
3 these local cooperation agreements, improving the language
4 in our encroachment permits. And do you all want to meet
5 again?

6 MR. SHAPIRO: Teri, if I can, in response to that
7 and to transition us to the next steps -- and, Jay, tell
8 me get if I get this wrong -- but I think the time urgency
9 of this is largely affected by SAFCA's permit that it's
10 applied for for the Natomas Levee Improvement Project
11 Phase 2, which is scheduled to be issued at the March
12 Board meeting. And SAFCA is intending to start
13 construction immediately following that. It has its 408
14 approval. It has all the steps it needs basically, except
15 largely that permit.

16 And so I don't want to presume the Board intends
17 to apply the Three Rivers policy to SAFCA. If it doesn't
18 intend to, there isn't as much urgency. But if it does
19 intend to, then this issue will come to the Board in
20 March. And if the Board imposes the Three Rivers solution
21 as it is, I think it's almost guaranteed that either
22 Sacramento County or Sutter County or the City of
23 Sacramento or all of them would refuse to sign the old
24 language and we would probably have a game of chicken,
25 which none of us win by playing.

1 So I just wanted to give you the timeline to help
2 you understand what I think is the next step. Beyond
3 that, I think the next one would be the Three Rivers levee
4 degradation permit, which would be a month or two later.
5 So we probably have a little bit of time for that.

6 I don't know of any other JPA permits. Do you,
7 Jay?

8 EXECUTIVE OFFICER PUNIA: No, I'm not aware of
9 any other permits.

10 SUBCOMMITTEE MEMBER RIE: Okay. Thank you for
11 that.

12 And did you want to comment?

13 SUBCOMMITTEE MEMBER DOHERTY: I think it was
14 Butch that wanted to comment.

15 Okay. So would you all like to meet again and
16 come up with some recommendations?

17 MR. SHAPIRO: We would be happy to propose
18 another meeting between your February and March Board
19 meeting, and to bring a local agency proposal for your
20 consideration, which would combine elements of things
21 we've talked about today. And then if the Subcommittee
22 can get behind that, it can recommend to the full Board.
23 If it can't, it can still at least present it to the full
24 Board, and we can go from there.

25 Is that appealing?

1 SUBCOMMITTEE MEMBER RIE: Yes. We can schedule
2 another meeting.

3 Mr. Punia, is our March Board meeting the fourth
4 Friday?

5 EXECUTIVE OFFICER PUNIA: Yes. I think it's on
6 the 27th. That's the fourth Friday.

7 SUBCOMMITTEE MEMBER RIE: Okay. So potentially
8 we could schedule something the second or the third week
9 of March.

10 SUBCOMMITTEE MEMBER DOHERTY: How about the 20th
11 of March?

12 MR. SHAPIRO: What day of the week is that?

13 SUBCOMMITTEE MEMBER DOHERTY: It's a Friday.

14 MR. SHAPIRO: That's a furlough day.

15 SUBCOMMITTEE MEMBER DOHERTY: Well, then today's
16 a furlough day.

17 EXECUTIVE OFFICER PUNIA: The first and third
18 Fridays are the furlough days.

19 MR. SHAPIRO: But the 13th would be okay.

20 SUBCOMMITTEE MEMBER DOHERTY: How about the 13th?

21 SUBCOMMITTEE MEMBER RIE: March 13th. Okay.

22 MR. SHAPIRO: Fast forward to my calendar.

23 SUBCOMMITTEE MEMBER HODGKINS: Here's the problem
24 I see with March 13th. If there was a proposal that the
25 Committee would support, I'm not sure you could get that

1 in front of the Board after finding that out at the
2 meeting of the 13th in time for the meeting that's two
3 weeks later, because of agendas and all of that. So I
4 think it would make sense to move it even one week sooner,
5 if we had to go to Thursday.

6 MR. SHAPIRO: March 5th, perhaps.

7 SUBCOMMITTEE MEMBER HODGKINS: Well, that would
8 be okay with me.

9 MR. SHAPIRO: That's a Thursday, one week
10 earlier.

11 SUBCOMMITTEE MEMBER HODGKINS: And in developing
12 this, if -- I don't think Subcommittee members necessarily
13 get to participate. But I'd like to encourage staff,
14 particularly Ward and Virginia, to work with you. Because
15 if there are proposed changes to those indemnification
16 provisions, it's going to be important to know whether you
17 guys are going to say, "No, we can't accept that. It's
18 contrary to State law." So we at least have the benefit
19 of that before we get into the meeting.

20 Is that fair?

21 SUBCOMMITTEE MEMBER RIE: Okay. I'm not sure
22 that it's going to be possible to develop some
23 recommendations and have that ready for the Board's
24 package before the March meeting. But we're looking at
25 March 5th or March 13th as possible meeting dates. And

1 we'll leave it up to Mr. Punia to schedule that and figure
2 out when he can schedule the court reporter, meeting
3 rooms, et cetera.

4 So if you all want to get notified of the
5 proposed meeting date, hopefully you'll put your contact
6 information outside and Jay will notify you when the best
7 date and time is. Okay?

8 MR. SHAPIRO: Okay. On behalf of the locals, can
9 I just thank you guys for taking the time to sit through
10 this, but also for the Board to be open to having the
11 discussion.

12 SUBCOMMITTEE MEMBER RIE: You're welcome.

13 Meeting's adjourned.

14 (Thereupon the Central Valley Flood
15 Protection Board, Joint Powers Agency
16 Subcommittee meeting adjourned
17 at 4:02 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, JAMES F. PETERS, a Certified Shorthand
3 Reporter of the State of California, and Registered
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5 That I am a disinterested person herein; that the
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11 I further certify that I am not of counsel or
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13 way interested in the outcome of said meeting.

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 this 23rd day of February, 2009.

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